

# Supreme Court of the United States

October Term, 1965

FRANK J. PATE, Warden,

*Respondent.*

v.

UNITED STATES ex rel. THEODORE ROBINSON,

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Seventh Circuit.

## BRIEF FOR RESPONDENT

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IN THE

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## BRIEF FOR RESPONDENT

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### QUESTIONS PRESENTED

#### A.

Questions Relating To Violations Of Constitutional Rights.

1) On the issue of Robinson's competence to stand trial:

(a) Where Robinson had a long history of mental illness, including a court ordered commitment to a mental

institution; and where four witnesses expressed the opinion that he was insane at the time of the trial, was Robinson denied due process of law by the failure of the trial judge to convene a jury to determine his competency in accordance with state procedure, or by the failure of the trial judge to afford Robinson a fair hearing on this issue?

- (b) Can an insane person "intelligently" waive his right to have his competency to stand trial determined?

2) On the issue of Robinson's sanity at the time of the crime:

- (a) Does fundamental due process prohibit the states from imposing criminal penalties upon acts committed while insane, so that a claim of insanity at the time of the crime is cognizable in habeas corpus?
- (b) Where the state failed to afford Robinson a fair opportunity to present the defense of sanity at the time of the crime, was he denied due process?
- (c) Where the state court did not, "after a full hearing reliably [find] the relevant facts" on the issue of sanity at the time of the crime, may the District Court hold an evidentiary hearing on that issue?

3) Was Robinson denied fundamental due process by the conduct of his trial in an atmosphere of haste which prevented him from obtaining the testimony of important witnesses?

4) Where Illinois requires the state to prove the defendant's sanity as an essential element of the crime once *any* evidence of insanity is introduced, was Robinson denied due process by his conviction when the state failed to produce any evidence that he was sane?

5) Is the sixth amendment right to compulsory process enforceable against the states? If so, did the state court's refusal to subpoena important witnesses specifically requested by Robinson deny him this right?

6) Did the District Court err in failing to appoint counsel for Robinson in that Court?

## **B.**

### **Questions Relating To Federal-State Relationships In Habeas Corpus Cases.**

On the question "whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the appropriate Illinois courts rather than in the District Court . . .":

- 1) Do the federal courts on habeas corpus have any power to "remand" a case to the state courts?
- 2) If a violation of Robinson's constitutional rights can be found without further hearings in the District Court, should the state courts be permitted to delay his release by granting him a limited hearing, or must they grant him a complete new trial?

### **CONSTITUTIONAL PROVISIONS INVOLVED**

In addition to the Due Process Clause of the fourteenth amendment, set forth in petitioner's brief, this cause involves questions raised under Amendment VI, United States Constitution, which provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

## STATEMENT

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The petitioner's statement of facts is incomplete. Petitioner ignores much of the evidence relating to the conduct of the respondent, Theodore Robinson, at the time of the shooting of Flossie Mae Ward and at the time of his arrest, which evidence was specifically relied upon by the Court below as bearing on Robinson's mental condition.<sup>1</sup> Petitioner totally ignores the evidence relating to the atmosphere of haste in which Robinson's trial was conducted, which the Court below found deprived Robinson of the full and fair trial required by due process.<sup>2</sup> Petitioner has also ignored or inadvertently misstated some of the most significant historical evidence presented by Robinson on the issue of his mental condition. Under the circumstances a full statement of facts is required.

### A.

#### Robinson's Trial In The State Court.

Respondent, Theodore Robinson, was indicted for murder and brought to trial in the Criminal Court of Cook County, Illinois on September 15, 1959. Robinson, an indigent, was represented by court-appointed counsel. His trial commenced shortly before noon on the 15th and was completed before the close of court on the 16th. Immediately upon the completion of the defendant's closing argument Robinson was found guilty of murder and sentenced to life imprisonment.

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<sup>1</sup> See Opinion of Court below, 345 F. 2d at 693-694 (R. 172-173).

<sup>2</sup> See Opinion of Court below, 345 F. 2d at 692-695 and specifically footnotes 2 and 5 in that Opinion (R. 170-171, 173-174, 176-177).

## THE STATE'S CASE.

Robinson concedes that the State's evidence was legally sufficient to prove that he shot and killed Flossie Mae Ward in the restaurant where she was employed in Chicago, Illinois. Robinson's defense was insanity at the time of the shooting. The evidence adduced by the state relating to the shooting of Flossie Mae Ward and the subsequent arrest of Robinson is, however, pertinent insofar as it tends to reveal Robinson's mental condition at that time.

The restaurant where Flossie Mae Ward was shot consisted of a small room, approximately 25 feet square. When Robinson entered the restaurant Flossie Mae Ward was standing behind the long part of an "L" shaped counter, near the front of the restaurant. (R. 52.) Further down the counter, almost at the back of the restaurant, stood two other employees. (R. 64, 73.)

When Robinson entered the restaurant, he walked over to the counter to a position directly opposite Flossie Mae, approximately 4 to 6 feet away from her. He had a gun in his hand. Flossie Mae said "Don't start nothing tonight, Ted." (R. 44, 69.) Robinson remained in this position and stared at Flossie Mae for approximately one full minute. (R. 69-70.) He then walked approximately 20 feet way from her, towards the back of the restaurant, without saying a word. (R. 70-71.) Robinson remained silent for the entire period he was in the restaurant. Although the counter had a gate, Robinson jumped over the counter at a point approximately three feet from the other employees, so that both were between him and Flossie Mae. (R. 73.) He then ran past the others to the front of the restaurant where Flossie Mae Ward was still standing. The witnesses heard shots and saw

Flossie Mae and Robinson jump over the counter and run out the door. (R. 44.) Flossie Mae Ward was found dead on the sidewalk outside the restaurant. (R. 93.)

Later that evening, the Chicago police received information from Robert Moore that Robinson was in Moore's apartment. (R. 80-81.) Three officers, two of them in uniform, proceeded to the Moore apartment. Standing in the hall approximately half-way between the elevator and the apartment was Robinson. Unaware of Robinson's identity, they walked past him without speaking and proceeded to Moore's apartment. The officers conversed with Mrs. Moore for approximately two minutes and learned that Robinson had left the apartment a short time earlier. As the officers turned to leave the apartment they saw Robinson, still standing in the hallway where they had first observed him. Apparently on the basis of Mrs. Moore's description, the officers approached Robinson and asked his name, which he gave to them. Robinson was placed under arrest but appeared confused, and was uncertain as to why he was being arrested. (R. 79-86, 88, 89-92.)

#### ROBINSON'S AFFIRMATIVE PROOF OF INSANITY.

In support of his defense of insanity at the time of the crime Robinson produced (1) the official record from the Kankakee State Hospital, a state mental institution to which he had been committed; (2) the testimony of four witnesses; and (3) the stipulated testimony of a police officer. This evidence also raised the question of whether Robinson was sane at the time of trial.

Robinson's history of mental illness began at the age of seven or eight, when he was struck on the head by a brick dropped from a third floor window. Robinson's mother testified that this blow knocked Robinson cross-eyed

and that thereafter he acted "a little peculiar" and suffered from headaches. (R. 131.) It appears that the abnormality of his conduct did not become acute for another ten years or so. From that time on, however, Robinson experienced increasingly frequent periods of depression and uncontrollable anger, usually culminating in physical violence. While on leave from the army, Robinson flew into an uncontrollable rage for no apparent reason and kicked a hole in the breakfront in his mother's living room. Afterwards, he stared at his mother without speaking and paced the floor with both hands in his pockets. (R. 132.) The next morning, Robinson's mother called a friend, Alice Moore, to talk to Robinson because his mother believed he was losing his mind. Robinson's mother (R. 132) and Alice Moore (R. 140-41) both testified about this incident at Robinson's trial.

After Robinson was discharged from the army, he kept a "glare" in his eyes and seemed to be lost in himself. He glared and said nothing when his mother attempted to speak to him. (R. 133.) Robinson's unusual behavior was also noticed by his grandfather, William Langham, who testified at the trial. (R. 144.) Mr. Langham employed Robinson to help paint ceilings; on numerous occasions Robinson would suddenly stop working, come down from the ladder and walk out without speaking. He would appear to be in a daze and would be gone for as much as two or three hours, after which he would return, apparently all right. (R. 144.)

In 1951, Robinson lost his mind entirely and was found pacing the floor, saying that someone was after him. (R. 133.) This incident occurred in the apartment of Robinson's aunt, Helen Calhoun. When he arrived at Mrs. Calhoun's house, he expressed the fear that some-

one was trying to kill him, and asked her to get down from where she was washing windows because "they" were trying to get her too. Mrs. Calhoun called Robinson's mother and when she arrived at the apartment, Robinson would not let his mother open the door. He believed that someone was going to shoot him or come in after him. When his mother finally gained admittance to the apartment and went to hug Robinson and to ask him what was wrong, he pushed her back, telling her to stay away because someone was going to shoot him. At that time, he was staring and foaming at the mouth. (R. 133.) The police were called, and when they arrived Robinson once again resisted having the door opened. The police officer who eventually entered immediately concluded that Robinson had lost his mind and ordered Robinson taken to the Hines Hospital, from which he was transferred to the County Hospital in an ambulance. (R. 134.)

After a week's stay in the County Hospital, Robinson was transferred by court order to the Kankakee State Hospital. The medical records of the Kankakee State Hospital, introduced into evidence by stipulation as Defendant's Exhibit Number 3, revealed that when Robinson was admitted in 1952, he was hearing voices and seeing things. The voices threatened him and he imagined someone was outside with a pistol aimed at him. He was extremely frightened and thought he was going to be harmed. The report further revealed that Robinson had been drinking heavily and raised the question of whether or not he was schizophrenic. The examiner, however, concluded that Robinson seemed to have recovered and indicated that he was willing to "give him a try" since his wife was insistent and was "in a pathetic state." (R. 164.) After a stay of approximately six or seven weeks, Robinson was released to the custody of his wife, although his mother believed that he was still insane. (R. 134.)

After his release from the mental institution, Robinson's condition grew progressively worse. On one occasion, Robinson, who had been fighting with his wife, attempted to kick down a door. He then left the room, gathered up his wife's clothes, threw them into the yard, and attempted to set fire to them. (R. 144-45.)

One Sunday in 1953, Robinson, whose wife had separated from him, brought his 18-month old son to Mrs. Calhoun's home and asked to stay there Sunday and Monday nights because he had no other place to go with the child. He was nervous, prancing and staring wildly, and appeared to be sick. He was totally incoherent. (R. 155-56.) The next day, while Mrs. Calhoun was away at work, Robinson shot and killed his son and attempted suicide by shooting himself in the head. (R. 135.) When Mrs. Calhoun returned from her work, she found the baby lying on the floor and called the fire department ambulance. While they were at the hospital, Robinson was brought in for treatment of his head wound. He had a wild look in his eye. (R. 155.) After shooting his child and attempting suicide, Robinson had again tried to take his life by jumping into a lagoon. (R. 148.) Apparently Robinson was arrested when he came to the South Park Street Police Station and told Officer Theodore Davis that he wanted to confess a crime, although there was also evidence that his arrest came when he walked up to a policeman in the park where he had been wandering and asked for a cigarette. (R. 136.)

Robinson was imprisoned for approximately four years for the killing of his 18-month old baby. (This conviction was apparently on a reduced charge, since the minimum sentence for murder in Illinois was then, and still is, 14 years. There are no degrees of murder in Illinois.)

After his release from the penitentiary, Robinson still appeared disturbed and acted abnormally. As a result, his mother went to the 48th Street Police Station and swore out a complaint against him. She told the police that she believed that he was insane and that she wished to have him returned to a mental institution. (R. 136.) As a result a warrant was issued in the summer of 1957 or 1958, but was never served. Thereafter, on an unspecified date shortly prior to the shooting, Robinson's mother had a second warrant issued. (R. 137.) All this time Robinson did not appear to be normal. He would look "starry-eyed" and would pace the floor. Usually he refused to talk at all. He looked extremely depressed and would glare at his mother and refuse to speak to her. (R. 137.) From November of 1957 or 1958 through January of 1958 or 1959 (the record is unclear) Robinson stayed with Mrs. Calhoun at her home. During that time he was extremely nervous. Mrs. Calhoun was quite afraid of him. She did not want him to know of her fears, but always carried some object to bed with her at night to protect herself in case he became violent. (R. 156.)

All of the witnesses who testified for Robinson expressed an opinion as to his sanity. Robinson's mother testified that in her opinion her son was insane and was incapable of distinguishing the difference between right and wrong. In her opinion, Robinson "thinks whatever he does is right." (R. 138.) Mr. Langham, who saw Robinson as recently as three or four days before the shooting of Flossie Mae Ward, testified that Robinson was "giddy." He further testified that Robinson had not "had a good mind" since he returned from the Army, and that in his opinion Robinson was insane and did not know the difference between right and wrong. (R. 146.) Mrs. Calhoun stated her opinion that Robinson was insane

at the time of the crime and the time of the trial, and that she believed that Robinson did not know the difference between right and wrong. (R. 157.) Alice Moore testified that, in her opinion, when Robinson was in his glaring, untalkative moods he was insane and did not know the difference between right and wrong. (R. 142.)

#### THE STATE'S REBUTTAL.

The state failed to offer a single word of rebuttal evidence on the issue of Robinson's sanity at the time of the crime.

With regard to his insanity at the time of trial, it was stipulated that Dr. Haines, Director of the Behavior Clinic of the Criminal Court of Cook County would testify that he had examined Robinson some three months prior to the trial and that at that time he knew the nature of the charge against him and could cooperate with counsel. (R. 161.)

Robinson's attorneys refused to stipulate that Haines would testify that Robinson was "sane" when he examined him. A colloquy ensued between the State's Attorney and the Court. (R. 161-62):

"Mr. Conley: Your Honor, Dr. Haines is not available now. I proceeded on the assumption after having talked to Mr. Carey that Dr. Haines' testimony to both matters would go in by stipulation. Now, the defense raised here is such that I think we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel. I think it should be in evidence, your Honor, that Dr. Haines' opinion is this defendant was sane when he was examined.

The Court: Isn't it a fact if Dr. Haines had found him insane, Dr. Haines would report that he could not cooperate with his counsel?

Mr. Conley: That is inferentially true and, therefore, I can't see why they should object.

The Court: You have enough in the record now. I don't think that you need Dr. Haines."

The state then rested. (R. 162.)

#### CONDUCT OF THE TRIAL.

Robinson's murder trial lasted only from 11:00 A.M. of one day to mid-afternoon of the next. Throughout the trial the judge evidenced impatience with the proceedings and a desire to dispose of the case as quickly as possible. The court refused, on three occasions, to grant short continuances for the purpose of obtaining the testimony of key witnesses. (R. 129-30; 147-48; 161-62.) Twice the court refused requests, one by Robinson and one by the state, for continuances of less than one-half day to obtain the testimony of expert witnesses as to Robinson's mental condition. As a result, no expert testimony was received on the basic issue in the case.

The following colloquies, occurring during the second day of the trial underscore the haste surrounding the conduct of the trial and the calling of witnesses:<sup>3</sup>

1) After a recess at the close of the State's case and prior to the beginning of the defense, the court indicated that it was ready to resume. Mr. McDermid, one of Robinson's counsel, was to conduct the defense. Mr. Carey, defendant's other counsel, addressed the court:

"Mr. Carey: If the Court please, Mr. McDermid, he is in the hall. I went to get him once. I will bring him in.

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<sup>3</sup> Most of these colloquies, and others in a similar vein were specifically quoted or referred to by the Seventh Circuit Court of Appeals in its opinion below.

The Court: Let's proceed, please. We have wasted fifteen minutes. We have thousands of indictments waiting for trial. I can't waste fifteen minutes waiting for defense counsel. Let's move."

2) A moment later Robinson indicated a desire to confer with Mr. McDermid:

Mr. McDermid: May I have one minute to satisfy—

The Court: We have wasted eighteen minutes. You must prepare your lawsuit before you come to court. We have been on trial now for a whole day and a half and you have had ample time to talk to your client. Go ahead, talk to him now." (R. 125-26.)

3) Later, Robinson requested that various witnesses who had been present in the restaurant at the time of the shooting be subpoenaed. The following colloquy ensued:

"The Defendant: I would like that the court be adjourned until tomorrow morning.

The Court: No, sir.

The Defendant: To give me time to confer with counsel for the calling of witnesses.

The Court: No, sir. We have been waiting here since 11:00 o'clock waiting for your lawyers. It is now 11:30. We have been on trial for a day and a half." (R. 126-27.)

4) After further discussions, Robinson specifically requested that Mr. and Mrs. Robert Moore be subpoenaed. Robinson had gone to the Moores' apartment after the shooting and had stayed there until shortly before he was arrested in the hall outside their apartment. Testimony relating to these facts and the Moores' report of Robinson's whereabouts had been introduced during the State's case. (A. 80-81, 83.) The following occurred:

"The Defendant: Well, I asked the attorney yesterday to subpoena Mr. and Mrs. Robert Moore.

The Court: What do they know about it?

The Defendant: In whose apartment I was arrested in, I mean arrested near.

The Court: What will they testify to?

The Defendant: Well, I do not know, sir, but I would like to have them subpoenaed in court.

The Court: We can't subpoena people unless you tell us what they are going to testify to." (R. 129.)

5) After three witnesses to Robinson's insanity had testified, it became apparent that, with only one available witness remaining, the defense would be concluded by mid-afternoon. Robinson's counsel informed the court that he wished to call an expert to testify as to Robinson's mental condition and that the doctor would not be available until the following morning:

"Mr. McDermid: Your honor, there is also a doctor from the Psychiatric Institute that we have been trying to get in contact with, and we do feel that we can reach him by the morning. We had hopes of reaching him and having him in here this afternoon.

The Court: When did you try to reach him?

Mr. McDermid: Back prior to July, we wrote and received a letter from the Institute in July, and had conversations at that time.

The Court: The Institute of Illinois?

Mr. McDermid: Yes. It is down at 11th and State Street.

The Court: Did you subpoena him?

Mr. McDermid: I understand it was done but I am not really sure.

The Court: If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay the trial. You must prepare your lawsuit be-

fore you go to trial, not during the trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him, it is unfortunate." (R. 147-48.)

6) The trial proceeded to its conclusion that afternoon without the testimony of any expert witness. The trial court's failure to continue the case to hear the testimony of the state's psychiatrist was noted above. (R. 161-62.)

7) Closing argument was waived by the State, and immediately upon the conclusion of defense counsel's argument the court, without asking if the State wished to present any rebuttal argument, called Robinson to the bench, found him guilty, sentenced him to life imprisonment and ordered him taken away:

Mr. Carey: (Concluding his argument) . . . Those are the only things that I wanted to call to the Court's attention.

The Court: Very well. All right, bring up the defendant, please.

The defendant is found guilty of the crime of murder. He is sentenced to the State Penitentiary for a term of his natural life. Take him away.

The Defendant: Judge, your Honor, may I say something before you take me out of your courtroom?

The Court: Yes, sir.

. . .

(The defendant then protested the court's refusal to permit him to subpoena witnesses and questioned the competency of his counsel.)

"The Court: The court is satisfied beyond a reasonable doubt —

The Defendant: Still and all, may I still say something?

The Court: (Continuing)—that you killed this woman. Whether these were your clothes or not your clothes, it doesn't make any difference. Take him away. Call the next case." (R. 165-66.)

## B.

### Proceedings After Conviction.

After his conviction, Robinson took an indigent appeal to the Supreme Court of Illinois. That Court affirmed, 22 Ill. 2d 162 (1961). This Court denied certiorari, 368 U.S. 857 (1961).

In April, 1962, Robinson filed his petition for writ of habeas corpus in the District Court. The petition alleged that his constitutional rights were violated in the 1959 state court proceedings. The petition further asserted that Robinson was indigent and unable to retain competent counsel to represent him during the course of the habeas corpus proceeding and requested that counsel be appointed to aid him. (R. 2-3.) On April 13, 1962, the District Court granted Robinson leave to file his petition for writ of habeas corpus *in forma pauperis*. The Court, however, ignored Robinson's request for appointment of counsel. (R. 14.) On April 18, 1962, the petition was dismissed for failure to exhaust state remedies (R. 14.) In 1963, Robinson moved to reinstate the petition and on May 1, 1963, an order was entered by the District Court requiring the state to furnish a transcript of the record in the Criminal Court of Cook County for the purpose of passing on the motion to reinstate. (R. 15.) On May 27, 1963, the District Court vacated its prior order dismissing the petition for failure to exhaust state remedies, reinstated the petition and denied it without hearing, citing only the

opinion of the Illinois Supreme Court in Robinson's direct appeal. (R. 15-16.) On June 12, 1963, a certificate of probable cause was issued and petitioner was granted leave to appeal to the United States Court of Appeals for the Seventh Circuit *in forma pauperis*. (R. 17.)

On appeal the Court of Appeals reversed the District Court's dismissal of the petition for writ of habeas corpus and remanded the case to the District Court for a plenary hearing consistent with its opinion.

On October 25, 1965, this Court granted certiorari to review the judgment of the Court of Appeals. In addition to the questions raised by the petition for writ of certiorari, this Court specifically requested that the parties brief and argue "the question whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the appropriate Illinois courts rather than in the District Court."

### **SUMMARY OF ARGUMENT.**

The evidence presented during Robinson's murder trial in the state court showed that he was incompetent to stand trial. Due process prohibits the trial of an insane person on criminal charges. Robinson was thus denied due process by being placed on trial while insane. Illinois law requires that the trial judge convene a jury to determine a defendant's competency to stand trial whenever any doubt arises on that issue. The trial judge, however, failed to conduct a hearing on Robinson's competency to stand trial, and this failure, in light of the overwhelming evidence of insanity, deprived Robinson of due process of law.

Moreover, the trial judge conducted Robinson's trial, on a charge of murder, in an atmosphere of haste, which, as the court below found, was "hardly consistent with the gravity of a capital case and protection of the right to

due process." As a result, Robinson was denied a reasonable opportunity to obtain the testimony of important witnesses on the question of his competency to stand trial, and thus was denied due process.

At the very least, the record fails to show that the state court "after a full hearing reliably found the relevant facts" on the issue of Robinson's sanity at the time of trial. Under *Townsend v. Sain*, 372 U.S. 293 (1963), a plenary hearing in the District Court is required.

Robinson's insanity at the time of the crime was unmistakably proven by the undisputed evidence presented in the state court. Robinson had once been committed to a mental institution by court order. His conduct over a period of many years, and at the time of the crime itself, supported the opinions expressed by four witnesses that he was insane at the time of the crime. Due process prohibits the imposition of criminal sanctions for actions committed while insane. Robinson was thus denied due process.

The atmosphere of haste in which the trial was conducted resulted in denying Robinson a fair opportunity to obtain important psychiatric witnesses. This haste also led the Court of Appeals to find that the state conviction was not supported by the record as a whole, and that the relevant facts were not reliably found in a full and complete hearing. Because due process prohibits the imposition of criminal sanctions for acts committed while insane, and because *Townsend v. Sain*, 372 U.S. 293 (1963), requires a hearing in the federal court when the state has not reliably found the relevant facts, the District Court must conduct a hearing into Robinson's sanity at the time of the crime. The record here amply supports the holding of the Court of Appeals that a plenary hearing on the question of Robinson's sanity was mandatory.

The record of Robinson's trial demonstrates on its face that he was denied fundamental due process by the conduct of his trial as a race against time, resulting in the effective suppression of important testimony. While the Court of Appeals ordered a plenary hearing, it in fact found violations of Robinson's constitutional rights. Accordingly, the writ of habeas corpus should issue, conditioned upon affording the state a reasonable time within which to grant Robinson a new trial.

There are several independent grounds for affirming of the decision of the Court of Appeals:

1) The undisputed evidence shows, on the face of the record, that Robinson was in fact insane at the time of the crime. Moreover, the state failed to introduce *any* evidence to prove an essential element of its case under Illinois law, namely, that Robinson was in fact sane at the time of the crime. The conviction of an accused based on a total lack of evidence as to an essential element of the crime violates due process. Thus, the decision of the court below should be affirmed in part, but modified to provide for unconditional issuance of the writ.

2) Robinson was denied his sixth amendment right to compulsory process by the trial court's refusal to issue a subpoena for important witnesses despite Robinson's specific personal request that a subpoena issue. The right to compulsory process is fundamental, and its denial deprived Robinson of due process. On this ground, the writ should issue, or at least a plenary hearing should be held to determine whether Robinson waived this right.

3) Robinson was denied his Sixth Amendment right to counsel by the District Court's refusal to appoint counsel to represent him in that court. The right to be represented by counsel is applicable to habeas corpus proceedings, at least where the petition is not frivolous on its face.

This Court specifically certified the question whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the appropriate Illinois courts rather than in the District Court. The evidentiary hearings ordered by the Court below to determine whether Robinson was insane at the time of the crime, and whether he was denied due process by failure to hold a hearing on his competency to stand trial, can only be held in the District Court. The federal courts have no power in habeas corpus to "remand" a case to the state courts. They must themselves determine whether Robinson's detention violates his constitutional rights, and if they find a constitutional violation, the writ must issue, although Robinson's release may be delayed to afford the state an opportunity to give him a new trial.

The question certified by this Court, however, raises the question of whether the record on its face requires that the writ of habeas corpus issue, conditioned upon affording the state an opportunity to grant Robinson a new trial or hearing. Because the Court of Appeals in fact properly found violations of Robinson's constitutional rights, the writ should have been issued. If the writ is issued, the question presented is whether it would be proper to permit the state to avoid Robinson's release by granting him a limited hearing on sanity at the time of the crime, or sanity at the time of trial, rather than a full new trial. The answer is "No." Robinson would not be afforded his full rights by such limited hearings under the circumstances of this case, and the considerations of "federalism" which led this Court to devise such an order in *Jackson v. Denno*, 378 U.S. 368 (1964), do not exist here. Moreover, the procedure devised in *Jackson* should be re-examined, or at least strictly limited to the peculiar facts of that case.

## ARGUMENT.

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### I.

#### **ROBINSON WAS DENIED DUE PROCESS OF LAW BY THE FAILURE OF THE STATE COURT TO IN- QUIRE INTO HIS COMPETENCY TO STAND TRIAL.**

Respondent, Theodore Robinson, asserts that he was denied due process of law by the failure of the state trial court to grant him a full and fair hearing on the question of his competency to stand trial.

### A.

#### **There Was Overwhelming Evidence That Robinson Was Insane At The Time Of The Trial.**

The evidence adduced at Robinson's trial in the Criminal Court of Cook County provides overwhelming support for his contentions. Four lay witnesses testified that in their opinion Robinson was insane at the time of trial. As the Court below emphasized, these opinions were based upon extensive factual testimony relating to a multitude of concrete examples of insane behavior observed during many years of personal acquaintance with Robinson.

Robinson had a history of twenty-four years of increasingly severe mental disturbances. His mental state fluctuated between moods of deep depression and high elation, the former marked by sullen, angry behavior, pacing the floor, refusing to speak, delusions of persecution, hallucinations and paranoid fears. In the extremes of both moods, but particularly when depressed, Robinson on many occasions had become unpredictable, uncontrollable and

dangerously violent. The undisputed evidence revealed that over a period of years prior to the crime charged, Robinson had destroyed furniture in his mother's home without cause; had walked away from his job in an apparent trance on numerous occasions; and had suffered a complete mental breakdown, marked by paranoid delusions, which resulted in his commitment to the Kankakee State Hospital, a State mental institution, by court order. A psychiatric report of the Kankakee Hospital suggested that he might be schizophrenic.

Although Robinson was released from the hospital supposedly "restored" to competency, the testimony of the witnesses showed that, if anything, these irrational episodes became more frequent and severe in the period after his release. Within a few years he had thrown all of his wife's clothes out of their home and attempted to burn them; shot to death his own 18 month old son; and attempted suicide, both by shooting himself in the head and by jumping into a lagoon. Within a month or two prior to the crime charged, his mother had sought a warrant to have him seized for involuntary commitment to a mental institution as a result of her concern over his deranged behavior. The warrant was never served.

The testimony relating to Robinson's conduct immediately before and after each of the episodes related above shows that on each occasion he was observed to be in the throes of one of his moods of extreme depression or elation. As discussed in more detail in section II, *infra*, the testimony of the state's witnesses about Robinson's conduct at the time of the alleged crime meshed perfectly with the testimony of the defense witnesses and showed that at the time of the shooting Robinson was in one of his typical glaring, uncommunicative, irrational moods of

depression, culminating in violence. Although the foregoing evidence was adduced primarily in connection with Robinson's defense of insanity at the time of the crime and was particularly significant on that issue, it was clearly sufficient to support the opinion of the witnesses that he was insane at the time of trial.

Petitioner contends (pp. 26-27) that Robinson's sanity at trial was revealed by colloquies he had with the trial judge. However, petitioner ignores the fact that these "colloquies" consisted of interruptions, arguments with the court and Robinson's court-appointed counsel, and insults directed at counsel. These colloquies, combined with the direct charge contained in Robinson's *pro se* petition for transcript that his counsel "aided the State to gain his conviction" are entirely consistent with his prior paranoid conduct, and while they may show that Robinson was not unintelligent, they support, rather than negate the contention that he was insane at the time of trial.

The only evidence adduced by the state on the question of Robinson's competency to stand trial consisted of a stipulation that Dr. Haines, Director of the Behavior Clinic of the Cook County Jail, would testify that he had examined Robinson some two to three months earlier and that in his opinion Robinson at that time "knew the nature of the charges against him and was able to cooperate with counsel." This stipulation revealed nothing with regard to Dr. Haines' qualifications as an expert witness, contained no mention of any facts on which his opinion was based, and offered no indication of the length or scope of his examination. Moreover, it related to only one of four issues which, under Illinois law, must be resolved in determining competency to stand trial. In *Pee-*

*ple v. Shrake*, 25 Ill. 2d 141 (1962), the required standards were stated as follows (25 Ill. 2d at 143):

“When the question of sanity at the time of trial is raised, the issue presented is whether defendant *has the capacity to make a rational defense, sufficient mind to convey necessary information to his attorney or the court*, the capability of understanding the nature of the charges against him and of cooperating with counsel, *and sufficient mind to conduct his defense in a rational and reasonable manner.* (Emphasis added.)

Realizing the inability of the stipulated testimony of Dr. Haines to meet, much less resolve, the substantial question of Robinson’s competency to stand trial, the Assistant State’s Attorney suggested that Dr. Haines, who was not available that afternoon, should be called to testify. Counsel for the state said:

“Now, the defense raised here is such that I think we should have Dr. Haines’ testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel.” (R. 166.)

As discussed below (pp. 27-28), Illinois provides a special procedure for determining whether or not a defendant is competent to stand trial in a criminal case. Under Illinois law the court was required, on its own motion, to suspend the trial and convene a jury to determine Robinson’s competency to stand trial if any question of his sanity at the time of trial were raised.

Despite the extensive evidence that Robinson was insane at the time of the trial, and despite the fact that the State’s Attorney himself expressed concern on this issue and felt that further testimony was necessary, the trial

court not only failed to convene a sanity hearing, but refused to continue the case until the next day to hear the live testimony of Dr. Haines, stating:

“You have enough in the record now. I don’t think you need Dr. Haines.” (R. 162.)

This was merely one of a long series of incidents demonstrating that the court was far more interested in a rapid disposition of Robinson’s case than in conducting the full and fair inquiry into his competency to stand trial which due process requires. On numerous occasions throughout the trial, which lasted only a day and a half, the court had chastized Robinson’s counsel for short delays and had urged them to proceed more rapidly. This atmosphere of haste was emphasized by the Court below, with extensive quotation from the report of proceedings in the trial court. See 345 F.2d at 692-94, particularly footnotes 2 and 5 (R. 170-171, 173).

These efforts of the trial court culminated in its refusing to grant Robinson a continuance of less than one-half day to obtain the expert testimony of a psychiatrist from the Illinois Psychiatric Institute, whose presence defense counsel had been unable to secure on September 16, but who would have been available the following morning. (R. 147.) The court stated (R. 148):

“If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay the trial. You must prepare your lawsuit before you go to trial, not during the trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him, it is unfortunate.”

It was indeed unfortunate, for under the incessant urging of the court the trial was concluded that afternoon without the live testimony of a single expert witness on either the issue of Robinson's competency to stand trial or the issue of his sanity at the time of the crime.

On this record the Circuit Court of Appeals reversed the judgment of the District Court (which had denied Robinson's petition without hearing) and remanded this cause to the District Court for a full hearing on Robinson's claim that he was denied due process by the state court's handling of the issue of his competency to stand trial.

### **B.**

#### **The Trial Of A Person While Insane Violates Due Process, And The State Must Provide A Fair Hearing On Sanity At The Time Of Trial.**

There can be no question but that the decision of the Court below is amply supported in law, as well as in fact. The most fundamental precepts of criminal law dictate that no man should be tried while insane. 4 Blackstone's "Commentaries" 24. The petitioner concedes that the trial and conviction of an insane man violates the due process clause of the fourteenth amendment. See *Massey v. Moore*, 348 U.S. 105 (1954); *Thomas v. Cunningham*, 313 F.2d 934, 937-38 (4th Cir. 1963).

A person held in custody as a result of a conviction obtained while he is insane is held in violation of his constitutional rights and is entitled to the writ of habeas corpus. *Bishop v. United States*, 350 U.S. 961

(1956); *Frame v. Hudspeth*, 309 U.S. 632 (1940); *Ashley v. Pescor*, 147 F.2d 318 (8th Cir. 1945).<sup>4</sup>

Although the states have some latitude in devising their own procedures for determining a defendant's competency to stand trial, the procedures must be adequate to insure the constitutional right, and the federal courts are obliged to scrutinize the manner in which the state procedures for establishing insanity are implemented. Illinois, by statute, provides that the question of a defendant's competency to stand trial shall be resolved by a jury impaneled for that purpose. Ill. Rev. Stats. (1957) Ch. 38, §§ 592-593. (Since replaced by Ill. Rev. Stats. (1965) Ch. 38, §§ 104-1 to 3). Under this statute, the trial judge is required to interrupt the trial and impanel a jury to inquire into the defendant's sanity if, at any time during the trial of a criminal case, a *bona fide* question is raised as to the defendant's competency. Recognizing that a defendant who is in fact incompetent to stand trial may well fail to raise the issue himself, the law places the duty upon the trial court to impanel a jury, whether the question of sanity is raised by defendant's petition, by the evidence presented, or by the court's own observation.

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<sup>4</sup> In his petition for writ of certiorari petitioner urged that the issue of insanity at the time of trial is "not cognizable" in habeas corpus, and asserted that a split existed among the circuits on this question, citing *Nunley v. United States*, 283 F. 2d 651 (10th Cir. 1961) and other cases from the 10th Circuit. Apparently, however, petitioner now concedes that a claim of insanity at the time of trial raises constitutional questions, cognizable in habeas corpus. He must in light of the holding of this Court in *Bishop* and the fact that the 10th Circuit cases which he relied upon in the petition have been expressly overruled. See *Nunley v. Taylor*, 330 F.2d 611 (10th Cir. 1964).

*People v. Bursen*, 11 Ill. 2d 360, 368, 370 (1957); *Brown v. People*, 8 Ill. 2d 540, 545 (1956).

If the state effectively denies to a particular accused the established state procedure for raising the insanity issue, he has been denied procedural due process, and the writ of habeas corpus must issue. In *Thomas v. Cunningham*, *supra*, a habeas corpus proceeding arising from a Virginia conviction under facts similar to the case at bar, the Court stated (313 F.2d at 939-40):

"Since due process entitled [petitioner] to have the matter [of competency] thoroughly 'canvassed' and the commonwealth provided the means for it, the federal court is obliged to scrutinize the procedures by which his claim was rejected."

The failure of the trial court to impanel a jury and conduct a hearing on the question of Robinson's sanity, in the face of the substantial doubts on that issue raised by the evidence, and expressed by the State's Attorney himself, clearly amounted to a denial of procedural due process.

Moreover, the atmosphere of haste in which Robinson's trial was conducted, culminating in the denial of a reasonable opportunity to obtain the volunteer testimony of an expert psychiatric witness, of itself deprived Robinson of a full and fair opportunity to develop material facts on the issue of insanity at the time of the trial, and thus constituted a denial of due process, without regard to the specific procedures required by state law.

## C.

**Robinson Did Not Waive His Right To A Sanity Hearing. The Doctrine Of Intelligent Waiver Can Not Be Applied Where The Evidence Raises The Issue Of Competency To Stand Trial.**

Petitioner advances two arguments in support of his contention that the judgment of the Court of Appeals on the issue of insanity at the time of trial should be reversed and the District Court order reinstated. Petitioner argues, first, that Robinson "waived" his right to a sanity hearing; and second, that in any event there was no ground for the trial judge to entertain a *bona fide* doubt of Robinson's competency, and thus no reason for a sanity hearing (Pet. Br. pp. 23-27). Neither contention has merit.

It is inherently contradictory to argue that a defendant who is incompetent to stand trial may nevertheless "waive" his right to have his competency determined. This Court has specifically held, and petitioner concedes, that a waiver of a constitutional right must be a "knowing" or "understanding" and "intentional" relinquishment of a "known" right. *Fay v. Noia*, 372 U.S. 391, 439 (1963). If that requirement has any force at all, it means that the right not to be put to trial in a criminal case while insane, and to have an adequate hearing on that subject in accordance with established procedures, cannot be waived. In rejecting a similar claim of waiver in *Taylor v. United States*, 282 F.2d 16, (8th Cir. 1960) [a case cited in petitioner's brief (p. 15)] the Eighth Circuit Court of Appeals stated (282 F.2d at 23):

"... if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so."

This, of course, is the very reason Illinois law requires the court to convene a sanity hearing whenever a doubt appears, regardless of whether the defendant requests it.

#### D.

#### **The Record Shows That A Sanity Hearing Was Required.**

The contention that there is nothing in the record to cause the trial court to entertain a doubt of Robinson's sanity is, we believe, fully answered by the record itself. Petitioner argues that the factual observations which formed the basis for the opinion of the lay witnesses that Robinson was insane at the time of trial related primarily to events which occurred before his commitment to Kankakee State Hospital and provided no evidence that his mental illness was of a continuing or enduring nature. As the Court below pointed out, this argument totally ignores much of the most significant evidence. Petitioner's reliance on the "evidence of sanity" arising from the colloquies between Robinson and the court during his trial is equally ill-founded. As pointed out above, these colloquies, considering their quarrelsome and suspicious nature, are at least as consistent with a finding of insanity.<sup>5</sup>

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<sup>5</sup> It might also be noted that both petitioner and the Supreme Court of Illinois ignored other statements by Robinson, such as his obvious lack of comprehension of the fact that his case was being defended strictly on a theory of insanity (R. 127, 165), and his statement in his petition for transcript that he thought his trial was merely a pretrial hearing. (R. 26.)

Certainly, as the Court of Appeals found, these colloquies cannot by any stretch of reason so override the extensive evidence of incompetency contained in this record as to justify the trial court's refusal to invoke the required procedures for canvassing the question.

Finally, the petitioner's factual argument wholly fails to meet the finding of the court below that the manner in which the trial was conducted in the state court deprived Robinson of a fair and adequate opportunity to present his evidence and resulted in an insufficient development of material facts.

### **E.**

#### **Robinson Was Denied Due Process By The State's Failure To Afford Him A Fair Hearing On Sanity At The Time Of Trial. The Writ Should Issue.**

On the basis of law set forth above and the facts revealed by the record of Robinson's trial in the state court, the Court of Appeals held that a full evidentiary hearing in the District Court was mandatory under *Townsend v. Sain*, 372 U.S. 293 (1963). The Court, therefore, remanded the cause to the District Court for that purpose. On the issue of Robinson's competency to stand trial the Court's order provided:

"The district court should also determine upon the hearing whether Robinson was denied due process by reason of failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing upon his competence to stand trial. If the court finds that Robinson's federal constitutional rights were violated in that respect, he should be ordered released, but such release may be delayed for a reasonable time to be set by the district court to permit the State of Illinois to grant Robinson a new trial." (345 F.2d at 698; R. 180.)

The Court below was clearly correct in holding that the District Court erred in dismissing Robinson's petition for writ of habeas corpus without conducting an evidentiary hearing. Certainly the record reveals a number of the circumstances which this Court in *Townsend* held would require such a hearing. We respectfully submit, however, that the record of Robinson's trial in the state court and the express findings of the Court of Appeals compel the conclusion that the Court of Appeals should itself have ordered the writ issued rather than remanding the case to the District Court for a plenary hearing.<sup>a</sup> Robinson's release, of course, could be delayed to give the state an opportunity to afford him a new trial.

It is apparent that the record of a state criminal trial may reveal defects in the state court treatment of a federal constitutional issue which, considered alone, would require the District Court on habeas to conduct a plenary hearing, while at the same time the record reveals, on its face, that

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<sup>a</sup> As discussed in section V of this brief, the law is clear that the federal courts, in habeas corpus, have no power to "remand" a case to the state court. If a constitutional defect is found in the State proceeding, they must grant the writ, though they may delay the petitioner's release to afford the state an opportunity to re-try the petitioner, or, in a limited class of cases, give him a limited hearing to cure the defect. In view of the foregoing, and in light of this Court's certification, on its own motion, of the question of whether any further proceedings in this cause should be held in the State courts, we presume that we are at liberty to urge the issuance of the writ, rather than a plenary hearing. The question of whether Robinson could be afforded anything less than a new trial in the state court, upon issuance of the writ, is discussed in section V. We believe the answer is "No."

the petitioner has in fact been denied due process with respect to that issue.

On the basis of its examination of the record of Robinson's trial in the state court, the Court of Appeals found:

(1) "Robinson's trial was conducted under an undue preoccupation with hurried disposition in an atmosphere charged with haste, hardly consistent with the gravity of a capital case and protection of the right to due process."<sup>7</sup>

(2) Robinson was denied "... a fair opportunity to obtain volunteer expert testimony from a public agency"<sup>8</sup> which "... could have weighed heavily on the question of his competency to stand trial."<sup>9</sup>

(3) "[T]he only likely means Robinson had to prove that his 'traits, conduct and crimes' were 'true manifestations' of insanity was the psychiatric testimony he was denied a reasonable opportunity to obtain";<sup>10</sup> and

(4) The Illinois courts had apparently ignored significant testimony from lay witnesses regarding Robinson's irrational conduct before and during the commission of the alleged crime.<sup>11</sup>

The Court below concluded:

"A review of the record of the state trial persuades us that Robinson was convicted of murder and sentenced to life imprisonment in an unduly hurried trial without a fair opportunity to obtain necessary expert psychiatric testimony in his behalf, without sufficient development of facts on the issues of insanity . . . at the trial, and upon a record which does not show that

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<sup>7</sup> 345 F.2d at 692; R. 170.

<sup>8</sup> 345 F.2d at 693; R. 171.

<sup>9</sup> 345 F.2d at 695; R. 176.

<sup>10</sup> 345 F.2d at 696; R. 177.

<sup>11</sup> 345 F.2d at 694, 696; R. 174, 177.

the state court 'after a full hearing reliably found the relevant facts'."<sup>12</sup>

We believe that these findings actually constitute a holding that Robinson was denied due process of law by the failure of the state court to afford him a full and fair hearing on the issue of his sanity at the time of trial and by the failure of that court to convene a jury, in accordance with the Illinois procedure, to determine his time-of-trial sanity. Thus, there is no need for further hearings. The writ should issue.

## F.

### **At The Least, A Plenary Hearing In The District Court Is Mandatory.**

At the very least the judgment of the Court below, remanding the question to the District Court for a full hearing should be affirmed. It is clear that, on the issue of Robinson's competency to stand trial, "the state factual determination is not fairly supported by the record as a whole; the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing . . . the material facts were not adequately developed at the state-court hearing; . . . [and] the state trier of fact did not afford the habeas applicant a full and fair fact hearing."<sup>13</sup> As this Court held in *Townsend*, under any one of these circumstances a full evidentiary hearing is mandatory. There is ample support for the ultimate conclusion of the Court of Appeals, which it framed in the language of this Court in *Townsend*, that the record "does not show that the state court 'after a full hearing reliably found the relevant facts.'"<sup>14</sup>

<sup>12</sup> 345 F.2d at 697; R. 179.

<sup>13</sup> *Townsend v. Sain*, 372 U.S. 293, at 313 (1963).

<sup>14</sup> 345 F.2d at 697; R. 179. Quoting from *Townsend*, *supra*, at 318.

## II.

**THE COURT BELOW CORRECTLY HELD THAT AN EVIDENTIARY HEARING ON ROBINSON'S SANITY AT THE TIME OF THE CRIME WAS MANDATORY.**

Robinson was denied due process of law because he was convicted of murder in the state court for acts which occurred while he was insane, and because he was denied a full and fair hearing on his insanity defense.

**A. The Evidence Showed That Robinson Was Insane At The Time Of The Crime.**

The evidence that Robinson was insane at the time of the shooting of Flossie Mae Ward is convincing and undisputed. The trial court was presented with the opinions of four lay witnesses that Robinson was insane and incapable of distinguishing right from wrong at the time of the alleged crime. As reviewed in detail in connection with the issue of sanity at the time of trial, these opinions were based on the witnesses' personal knowledge of a long series of totally irrational acts by Robinson. The witnesses testified to Robinson's frequent outbursts of violence, his periods of grave depression, his commitment to a state mental institution, the killing of his 18 month old baby, his attempted suicides, and efforts by his mother to have him recommitted to a mental institution a short time prior to the shooting. Further support for Robinson's claim of insanity was provided by the record from the Kankakee State Hospital and the stipulated testimony of Officer Davis with regard to Robinson's suicide attempts.

In light of this testimony, the evidence adduced from the state's witnesses with regard to Robinson's conduct at the time of the alleged crime was particularly significant.

On those occasions when Robinson's behavior had been especially violent, he was described as solemn, morose, uncommunicative, "glassy-eyed," dazed, and irrational. The testimony relating to Robinson's conduct at the time of the shooting and at the time of his arrest provides striking evidence that he was in a similar state when Flossie Ward was killed. As the Court of Appeals noted, the state court apparently ignored this evidence.

Robinson, with gun in hand, entered the restaurant where Flossie Mae Ward was working. He walked to a position directly opposite her and less than six feet away, across a counter. From this position he "glared" at her for a full minute without speaking. Still silent, he walked away from her for a distance of about twenty feet, to the back of the restaurant. He then jumped over the counter (although there was a gate nearby), thus placing two persons between himself and Flossie in the crowded space behind the counter. He then rushed past the two toward Flossie and fired two shots. Although Flossie spoke to him when he entered, Robinson did not speak a word during the entire episode.

The day after the shooting Robinson watched two uniformed policemen emerge from an elevator and pass him in a hall near the Moores' apartment, where he had been since the shooting. Although Robinson was standing near the elevator, and the policemen had not recognized him, he made no effort to escape, but remained there while the policemen stopped at the Moores' apartment and questioned Mrs. Moore. After about two minutes the policemen left the Moores' apartment, walked back towards Robinson, and asked him to identify himself. He did so without hesitation and appeared to have no knowledge of what they wanted with him.

Keeping in mind the undisputed evidence of Robinson's conduct from the time he was a small boy through the time of his arrest, we respectfully call this Court's attention

to the interrelated definitions of paranoid type schizophrenia, manic-depression and schizophrenic reaction, schizo-affective type, collected from the leading texts on mental illness and set forth in Appendix A. Robinson presented a textbook case.

In spite of this evidence, the state failed to offer a *single word* in rebuttal on the issue of Robinson's sanity at the time of the alleged crime.

Under Illinois law, as petitioner concedes, whenever a defendant raises the issue of sanity at the time of the crime and produces *any* evidence in support of that defense, the burden falls upon the state to prove the defendant's sanity beyond a reasonable doubt. *People v. Munroe*, 15 Ill. 2d 91, 98 (1958). Having adopted this standard for testing the insanity defense, the state must, of course, afford it to all defendants. Thus, despite the overwhelming evidence that Robinson was in fact insane at the time of the crime, the state trial court apparently found, and the Illinois Supreme Court in fact held, that Robinson had not adduced *any evidence* which properly bore on the issue of his sanity at the time of the alleged crime. The Illinois Supreme Court found no evidence which it felt indicated that the condition which had caused him to be committed to a mental institution in 1951 was of a "permanent or continuing nature." These findings are completely refuted by the undisputed evidence in the record. As the Court of Appeals reasoned:

"Presumably the Illinois Supreme Court saw little importance in the testimony of Robinson's mother of her unsuccessful attempts to have the police arrest her son so that he could be confined in 1958, or in the testimony concerning Robinson's eccentric behavior in committing the alleged murder. The mother's attempt to have Robinson committed the year before that homicide and his odd antics in the homicide were five and six years after the adjudication of sanity." (345 F.2d at 694; R. 174.)

The undisputed evidence conclusively proves that Robinson was insane at the time of the crime. At the very least, however, it is clear that, in the language of this Court in *Townsend v. Sain*, 372 U.S. 293, 313 (1963):

“... the state factual determination is not supported by the record as a whole.”

**B. Robinson Was Denied A Fair Hearing On His Insanity Defense.**

As the Court below specifically indicated, if there was any inadequacy in Robinson's proof of insanity at the time of the crime, it was the result of the state court's conduct of the trial as a race against time, culminating in the denial to Robinson of a fair opportunity to obtain the testimony of important witnesses.

Throughout the trial, the judge repeatedly urged Robinson's attorneys to hurry their presentation and berated them for wasting time. The proceedings at the end of the trial were particularly revealing of the court's attitude. In a space of a few minutes he rejected the state's attorney's suggestions that Dr. Haines be called, in effect suggested that the prosecutor not argue his case, and then, after the defense argument, without even asking if the prosecution had any rebuttal argument, called the defendant to the bar, found him guilty of murder, pronounced sentence (without asking for aggravation or mitigation), ordered the defendant taken away, and called the next case.

These and other incidents revealing the court's attitude are described in footnote 2 of the opinion of the Court below. (345 F.2d at 692-93; R. 170-71.)

The most important result of the attitude of the trial court was to deny Robinson an adequate opportunity to obtain the testimony of important witnesses. At the opening of the defendant's case, Robinson himself requested that Mr. and Mrs. Moore be subpoenaed. The trial judge, however, refused Robinson's request, ostensibly on the ground that, because Robinson could not anticipate the testimony of the Moores, he had no right to subpoena them. As the Court of Appeals pointedly observed, however:

"It could be that their observation of Robinson the day following the homicide was material to the question of his insanity the previous night.

\*     \*     \*

"Without any specification by Robinson, the relationship of the Moores to the case should have been apparent from the testimony concerning Robinson's arrest. They saw Robinson the day after the homicide and could have given testimony of their observation of him, on the question of his insanity at the time." (345 F.2d at 695, 697; R. 175, 179.)

Even more serious was the denial to Robinson of a continuance of less than one-half day for the purpose of obtaining the testimony of an expert psychiatric witness. The facts in regard to this incident have been set forth above. As the Court below indicated, it ill lies in the mouth of petitioner to urge, on the one hand, that Robinson failed to offer any proof that his insanity was of a permanent or continuing nature, while on the other hand supporting the trial court's "denial of a reasonable opportunity to Robinson to obtain psychiatric testimony which could have had substantial bearing upon the very question of Robinson's 'permanent and continuing' mental state." (345 F.2d at 694; R. 174.)

As discussed in section III of this brief, *infra*, we believe that the state court's conduct of Robinson's trial as a race against time so severely impinged upon his fundamental constitutional right to a full and fair trial as to constitute a violation of due process on the face of the record. At the very least, however, the record is more than ample to support the findings of the court below that:

"... Robinson was convicted of murder and sentenced to life imprisonment in an unduly hurried trial without a fair opportunity to obtain necessary expert psychiatric testimony on his behalf, without sufficient development of facts on the issues of insanity at the time of the homicide . . . and upon a record which does not show that the state court, 'after a full hearing reliably found the relevant facts.' " (345 F.2d at 697; R. 179.)

On the basis of these findings the Court below properly held, pursuant to the decision of this Court in *Townsend v. Sain*, *supra*, that the District Court erred in dismissing Robinson's petition without a full evidentiary hearing on the issue of Robinson's sanity.

### **C. Petitioner Does Not Dispute These Facts And The Findings Based Thereon.**

Petitioner, in his brief in this Court, makes no effort to dispute these findings. In effect, he concedes that the state factual determination that Robinson was sane at the time of the crime is "not fairly supported by the record as a whole,"<sup>1</sup> concedes that "the material facts

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<sup>1</sup> *Townsend v. Sain*, *supra*, at 313.

(on the sanity issue) were not adequately developed at the state court hearing,"<sup>2</sup> and concedes that "the state court has not after a full hearing reliably found the relevant facts."<sup>3</sup> Nevertheless, petitioner argues, the decision of the Court below must be reversed because the question of Robinson's sanity at the time of the crime "... is one of fact for the trier of fact and raises no federal constitutional questions. It is, therefore, outside the ambit of the jurisdiction of a federal court on a habeas corpus proceeding involving a state conviction." (Pet. Br. p. 15.)

#### **D. The Insanity Defense Raises Fundamental Due Process Questions.**

The petitioner's argument is entirely without support, in law or in logic. In fact, petitioner's argument contains internal inconsistencies which reveal its lack of merit. While beginning its argument with the bald proposition that the question of whether Robinson was sane at the time of the crime "raises no federal constitutional issues," petitioner ultimately concedes that "... 'basic fairness' may require that a person not be convicted of a crime committed while he is insane . . ." (Pet. Br. p. 19.) This latter statement is clearly correct, yet entirely inconsistent with petitioner's basic premise.

A fundamental notion in any civilized system of criminal law is that a person may not be convicted of a crime for acts committed while insane. Such a conviction violates due process as guaranteed by the fourteenth amendment.

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<sup>2</sup> *Totensend v. Sain*, *supra*, at 313.

<sup>3</sup> *Totensend v. Sain*, *supra*, at 318.

As Justice Frankfurter stated, "Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder." *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 570 (1953) (dissenting opinion).

While the language quoted is from Justice Frankfurter's dissenting opinion, it is apparent that the majority of this Court in *Baldi* also accepted the proposition that the failure of a state to recognize the defense of insanity at the time of a crime, or to afford a defendant an adequate opportunity to sustain it, would violate due process. The only disagreement between the Justices in *Baldi* was whether the defendant there had in fact been denied a full and fair hearing on the issue.

Individual states have twice attempted to abolish the defense of insanity. Neither case reached this Court; on both occasions the state supreme courts themselves invalidated the laws on due process grounds. *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910).

Clearly, basic notions of fundamental fairness prohibit a procedure which would withhold from an accused an insanity defense. Such a procedure so departs from "the concepts of ordered liberty" as to "shock the conscience" of civilized persons. *Palko v. Connecticut*, 302 U.S. 319 (1937).

#### **E. Federal Courts Must "Canvass" State Findings As To The Insanity Defense.**

Once it is admitted that the states are required by the Constitution to recognize, in some form, the defense of insanity at the time of the crime and that they are prohibited

from invoking criminal sanctions against persons who were insane at the time of allegedly criminal acts, it necessarily follows that the federal courts have the power and the duty to inquire into the circumstances whereby the defendant's insanity claims were rejected. If that inquiry reveals, as it does in this case, that the defendant was denied a full and fair evidentiary hearing in the state court, then the federal courts *must try the facts anew*. The petitioner's proposition that the question of insanity at the time of the crime is "one of fact for the trier of fact" in no way supports his conclusion that it is not cognizable in habeas corpus. Indeed, this Court held in *Townsend v. Sain*, 372 U.S. 293 (1963) that it is precisely in the case where a question of fact is involved in resolving a constitutional issue that the federal courts on habeas corpus may be required to hold an evidentiary hearing, such as was ordered by the Court below in the case at bar. This Court specifically stated in *Townsend* (372 U.S. at 312):

*"It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."* (Emphasis added.)

This Court held that an evidentiary hearing is mandatory where the facts are in dispute and the habeas applicant did not receive a full and fair evidentiary hearing in the state court. More specifically, this Court enumerated six situations in which an evidentiary hearing in the District Court is mandatory, stating (372 U.S. at 313):

"We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) *the state factual determination is not fairly supported by the record as a whole*; (3) *the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing*; (4) there is a substantial allegation of newly discovered evidence; (5) *the material facts were not adequately developed at the state-court hearing*; or (6) *for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.*" (Emphasis added.)

The Court below found, specifically or by implication, that at least four of these circumstances are applicable to the case at bar. These findings are amply supported by the record of Robinson's trial in the state court. Thus, the Court below was clearly correct in holding that the District Court erred in failing to hold an evidentiary hearing on the question of Robinson's sanity at the time of the alleged crime.

Petitioner offers no reasoning in support of his contrary conclusion other than the specious claim that, since a determination by a federal court that Robinson was in fact insane at the time of the crime would in effect be a determination that he was not guilty of the crime of murder, the federal courts are somehow precluded from exam-

ining the issue, and must suffer Robinson's continued unlawful incarceration by the state despite its failure to afford him a full and fair hearing on the issue of his sanity at the time of the crime. The petitioner's position boils down to the proposition that, while the federal courts may re-examine state court findings on constitutional issues where the claimed denial of due process *may* have contributed to the defendant's imprisonment (as by use of an involuntary confession), they may not examine state findings on constitutional issues if the claimed denial of due process *necessarily* resulted in the defendant's imprisonment. To state the proposition is to defeat it.

#### **F. Petitioner's Authorities Do Not Support His Position.**

Just as petitioner's contentions are unsupported by logic, so they are unsupported by relevant and valid authority. Petitioner relies heavily upon *Whelchel v. McDonald*, 340 U.S. 122 (1950). (Pet. Br. 18-19.) In that case the petitioner sought relief by habeas corpus from a general court martial conviction, asserting that he was insane at the time of the alleged crime. This Court found it unnecessary to reach the question of whether denial of the defense of insanity at the time of the crime to a court-martial defendant would violate due process, because the Manual for Courts Martial required the military courts to afford defendants that defense. Furthermore, the record in fact showed that, although petitioner had not even raised the defense at trial, he had been examined and reported to be sane both by the officer investigating the crime and by a neuro-psychiatrist. The Division Staff Judge Advocate had found that the prisoner was not insane, either on a permanent or temporary basis. 340 U.S. at 123-24. This Court, in affirming the Court of Appeal's

denial of the habeas corpus petition, held that only the denial of an opportunity to present the insanity defense would go to the question of jurisdiction of the Court Martial, and that since the record showed an adequate opportunity to present the defense had been afforded, it had no power, as a civil court, to reach any error of the military court in evaluating the evidence. As petitioner seems to concede, *Whelchel* is distinguishable from the case at bar, for one reason, because of the narrower scope of review by civil courts of court-martial proceedings. E.g., *In re Tamashita*, 327 U.S. 1, 8-9 (1946); *United States v. Grimley*, 137 U.S. 147, 150 (1890).

More important, however, the *Whelchel* case is distinguishable: (1) because the Court there specifically based its opinion on the doctrine that habeas corpus lies only to correct constitutional errors which go to the jurisdiction of the convicting courts, and (2) because the Court there found, and the record showed, that the petitioner had been afforded an opportunity to present the defense of insanity at the time of the crime. (340 U.S. at 124.)

Whatever validity it may have in court-martial cases, the doctrine that the federal courts, on habeas corpus, may inquire into alleged violations of constitutional rights only if the claimed violation goes to the "jurisdiction" of the convicting court, and that thus there may be no inquiry into the factual findings of a court of competent jurisdiction on constitutional issues, has no present validity in cases involving habeas corpus from state court convictions. Indeed, as this Court pointed out in *Fay v. Noia*, 372 U.S. 391, 404-12 (1963), the theory that habeas corpus will not lie to review errors not going to the jurisdiction of the convicting court has always been largely a legal fiction. Certainly it is clear from *Townsend* and *Fay v.*

*Noia* that if the Constitution requires that a state court defendant be afforded the defense of insanity at the time of the crime, the federal courts have a duty, on habeas, to inquire into the circumstances under which the insanity defense was rejected, and to hold a plenary hearing on that issue if deemed necessary under the standards laid down by *Townsend*.

Furthermore, the implication of *Whelchel* that the Constitution would at least require that a defendant have an *opportunity* to present the sanity defense actually supports the decision of the Court below in the case at bar. Petitioner apparently reads the requirement of an "opportunity" as excluding any requirement that the opportunity be "adequate". Such a reading is entirely unjustified. This Court, in dealing with substantial constitutional rights, has never held that mere form is sufficient where substance is lacking. Clearly, if the Constitution requires that the insanity defense be recognized and afforded to a defendant, this requirement cannot be circumvented by denying the defendant an *adequate* opportunity to present it. The record here shows, and the court below specifically found, that Robinson was denied an adequate opportunity to prove his insanity by the state trial court. The opposite was true in *Whelchel*.

Petitioner's reliance on *Leland v. Oregon*, 343 U.S. 790 (1952) (Pet. Br. 17-18) is equally misplaced. Petitioner claims *Leland* shows that the Constitution does not require the states to recognize the defense of insanity at the time of the crime and thus that rejection of this defense raises no federal constitutional issues and is not cognizable in habeas corpus. Petitioner reaches this conclusion from the fact that this Court in *Leland* held that the states were free to adopt the M'Naghten test of insanity and

to require defendants who would raise the defense to bear the burden of proof beyond a reasonable doubt. Petitioner argues that, since the states are free to adopt different tests of insanity, and different standards of proof for asserting it, the defense of insanity at the time of the crime is not guaranteed by the Constitution, so that the states would be free to abolish the defense altogether.

In fact, of course, petitioner's argument is a *non-sequitur* and *Leland* is irrelevant to the issues of this case. The fact that the states may be free to adopt different standards and procedures with regard to determining an issue does not mean it is not a "constitutional issue." For example, the states are still afforded great latitude in devising their own tests and methods of determining the question of sanity at the time of trial, an issue which the petitioner concedes is "constitutional" and cognizable on habeas corpus. Similarly, in the area of coerced confessions, the states were afforded substantial latitude in devising their own procedures for testing confessions long after this Court held that the use of a coerced confession in a state criminal trial violated due process, although expanding concepts of due process have gradually caused this Court to limit the state's latitude in the confession area (e.g., *Jackson v. Denno*, 378 U.S. 368 (1964)). Similarly, today this Court might well reach a different result in *Leland* on the question of whether the state may constitutionally impose the burden of proving insanity beyond a reasonable doubt upon the defendant,<sup>4</sup> but that is not

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<sup>4</sup> This question is not likely to arise, since Oregon, the only state which imposed such a burden when *Leland* was decided, has since amended its statute. Oregon Rev. Stats., Ch. 136, § 136.90, as amended, ch. 380, § 1 (1957).

relevant to the issue of whether the constitution requires the states to recognize the insanity defense in some form and prohibits the conviction of a defendant for acts committed while insane.

Furthermore, as pointed out above, the adoption by a state of a standard for determining an issue which meets or exceeds the standard required by the Constitution neither relieves the state of the obligation to afford each defendant the protection of the standards it has freely adopted, nor permits it to deny a defendant an adequate opportunity to present the issue in accordance with those standards. Procedural due process requires the state to give a defendant an adequate opportunity to present the insanity defense in accordance with the tests and procedures adopted by the state. Under *Townsend* the federal courts on habeas must examine the state findings and hold a plenary hearing if, as in the case at bar, the defendant was denied a full and fair hearing.

Petitioner asserts that this is the first case in which it has been indicated that the federal courts may hold a plenary hearing on the question of whether a state prisoner was insane at the time of the crime. On the contrary, even the 8th Circuit, upon whose decisions the petitioner heavily relies, has ordered such a hearing. See *Mitchell v. Henslee*, 332 F.2d 16, 18-19 (8th Cir. 1964).

Moreover, the courts of appeals cases cited by petitioner all involve federal rather than state prisoners. In most cases, §2255 relief was held not available to raise the issue of insanity at the time of the crime solely because the federal prisoners had failed to appeal. These cases simply stand for the proposition, not relevant to this case, that collateral proceedings cannot be used by federal prisoners as substitutes for appeal. *Taylor v. United States*, 282

F.2d 16 (8th Cir. 1960); *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), *vacated on other grounds*, 350 U.S. 961 (1956); *Hall v. Johnston*, 86 F.2d 820 (9th Cir. 1936). Under the theory of these cases, an insanity defense should be considered on appeal, and failure to raise it on appeal waives any right to raise it in collateral proceedings. The issue of insanity at the trial, however, has been held not to be waived by failure to raise it at trial or on appeal, because an insane prisoner cannot knowingly "waive" such an issue. Thus, §2255 relief would lie in this instance. See, e.g., *Taylor v. United States*, 282 F.2d 16, 21-23 (8th Cir. 1960). The theory of "waiver" of the issue of the defense of insanity at the time of the crime by failure to appeal espoused by these cases can be seriously questioned since *Fay v. Noia*, 372 U.S. 391 (1963) and *Sanders v. United States*, 373 U.S. 1, 12, (1963), but in any event there is no issue of waiver of that defense here.

In two cases cited by Petitioner, *Hahn v. United States*, 178 F.2d 11 (10th Cir. 1949), and *Hall v. Johnston*, 86 F.2d 820 (9th Cir. 1936), the refusal to review insanity at the time of crime was premised on the now discredited theory that collateral attacks would lie only against judgments rendered without jurisdiction. (See argument, *supra*, p. 46).

Several other cases cited by petitioner summarily adopt the questionable rationale of the *Taylor* and *Hahn* cases. *Richards v. United States*, 342 F.2d 962 (8th Cir. 1965); *Burrow v. United States*, 301 F.2d 442 (8th Cir. 1962); *Nunley v. United States*, 283 F.2d 651 (10th Cir. 1960). The case of *Roe v. United States*, 325 F.2d 556 (8th Cir. 1963) made no finding whatsoever as to insanity at the time of crime. The petitioner there only raised the issue

of competency to stand trial. In *Wheeler v. United States*, 340 F.2d 119 (8th Cir. 1965), §2255 relief was denied because the petition was patently frivolous; the question of insanity was raised solely by a flat assertion of insanity, with no facts in the record cited for support.

Those cases which cite the *Taylor* decision (*Burrow, Roe, Wheeler, Richards*) do so in a most perfunctory manner. As was earlier mentioned, *Taylor* rests on the premise that federal prisoners should properly exhaust appeal procedure, and that collateral attacks cannot be substituted for such procedure. None of these cases discusses the constitutional issues raised by inadequate state fact findings as to an insanity issue. Nevertheless, even if these decisions stood for the broad proposition for which they are cited, and assuming without conceding that these decisions still have some validity, since *Townsend* and *Fay*, in § 2255 cases it is clear from the very language of the *Bishop* decision quoted by petitioner that they have no validity in determining the limits of federal court jurisdiction in habeas on application by state prisoners. The Court of Appeals in *Bishop* stated (223 F.2d 582, 584; Pet. Br. p. 16):

“The issue of insanity as a defense is presentable upon the trial and appealable if error has been made with respect to it, and a motion to vacate under Section 2255 cannot be used as a substitute for an appeal. Therefore an alleged insanity at the time of the commission of a crime cannot be used as the basis for a motion under Section 2255.” (Emphasis added.)

It is clear that if this language is intended to do anything more than apply the doctrine of exhaustion of remedies and waiver to §2255 cases, it cannot be applicable to state convictions, for virtually every case which this Court has decided on application for habeas corpus by a state

prisoner has involved an issue which is "presentable upon trial and appealable if error has been made with respect to it." There may be some logic in refusing to permit a federal prisoner to re-raise, under §2255, an issue which the same federal courts determined, or could have determined, on trial and direct appeal. On the other hand, the very purpose of affording a state prisoner the remedy of federal habeas corpus is to enable him to test in the federal courts the constitutionality of procedures which the state courts, on trial and appeal, have upheld. *Fay v. Noia*, 372 U.S. 391, 422-24 (1963).

We have never contended that the decision of this court in *Smith v. Baldi*, 344 U.S. 561 (1953), constitutes an express holding that the state court conviction of a defendant who was insane at the time of the alleged crime would raise an issue which is cognizable in habeas corpus. Nevertheless, contrary to petitioner's suggestion (p. 22), this Court did not decide the jurisdictional point in *Baldi sub silencio*. This Court expressly reviewed the habeas corpus petition of a state prisoner which alleged he was deprived of due process because the question of his sanity at the time of the crime was not adequately "canvassed" by the state court. This Court held, however, that in the particular state proceedings involved in *Baldi*, the issue of insanity had been sufficiently canvassed. (344 U.S. at 570.)

Obviously, this Court never would have decided the question on its merits if it entertained any question of its jurisdiction to consider the issue on petition for writ of habeas corpus. The *Baldi* case clearly repudiates petitioner's illogical and unsupported assertion that the defense of insanity at the time of an alleged crime is "not cognizable" in federal habeas corpus. Certainly the illogical and concededly *sub silencio* implication which peti-

tioner purports to draw from the *per curiam* remand order in *Bishop v. United States*, 350 U.S. 961 (1956) (Pet. Br. p. 16) cannot displace the clear implication of the *Baldi* decision, or the express holding of *Townsend v. Sain* that the federal courts must review state fact finding procedures where constitutional rights are involved.

Basic concepts of fundamental fairness in the administration of criminal justice require that the states afford the defense of insanity at the time of the crime to criminal defendants, and procedural due process requires that each defendant be afforded an adequate opportunity to present this defense in accordance with the state-adopted tests and procedures. This being so, the reasoning of *Townsend* clearly requires the conclusion that, as in the case of any other constitutional issue, the federal courts have the right and the duty on habeas corpus to examine the basis for the state court's rejection of the claim of insanity and to try the facts anew if it appears that the state findings are not fairly supported by the record as a whole, or that the state failed to find the relevant facts after a full and complete hearing.

### III.

#### **ROBINSON WAS DENIED A FULL AND FAIR TRIAL IN THE STATE COURT IN VIOLATION OF HIS FUNDAMENTAL RIGHT TO DUE PROCESS.**

As demonstrated above, there is no merit to petitioner's contention that the issue of Robinson's sanity at the time of the crime has no constitutional significance and hence is not cognizable in habeas corpus. But even if petitioner's position were well taken, it provides no basis for reversal of the judgment below, for it is clear that fundamental

concepts of due process require the state to afford criminal defendants an adequate opportunity to present witnesses in their behalf in support of any defense recognized by the state, regardless of whether the Constitution would *require* the state to recognize that defense. Robinson was denied a fair trial by the failure of the state to afford him a fair opportunity to present important witnesses on the issue of his sanity at the time of the crime, an issue which Illinois concededly recognizes, whatever its federal constitutional significance.

The record of Robinson's trial in the state court conclusively demonstrates, as the Court of Appeals found, that "Robinson's trial was conducted under an undue preoccupation with hurried disposition in an atmosphere charged with haste, hardly consistent with the gravity of a capital case and protection of the right to due process."<sup>1</sup>

As a result, Robinson was denied an opportunity to obtain the testimony of two witnesses (the Moores) who had observed him during the period immediately after the homicide, and who "... could have given testimony of their observation of him, on the question of his insanity at the time."<sup>2</sup>

More important, another result of the haste with which the trial was conducted "... was denial to Robinson, an indigent represented by court-appointed counsel and obviously without funds to pay for expert psychiatric testimony, of a fair opportunity to obtain volunteer expert testimony from a public agency."<sup>3</sup> The Court below found

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<sup>1</sup> 345 F.2d at 692; R. 170.

<sup>2</sup> 345 F.2d at 697; R. 179.

<sup>3</sup> 345 F.2d at 693; R. 171.

that this testimony was crucial to Robinson's defense of insanity at the time of the crime and observed that:

"... the denial of a reasonable request to obtain the services of a necessary psychiatric witness is effectually a suppression of evidence violating the fundamental right of due process." (345 F.2d at 695; R. 175.)

The principle that the denial of a reasonable opportunity to secure the testimony of an important witness of itself constitutes a denial of due process is perhaps best stated in *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961). In that case defendant, an indigent person represented by court-appointed counsel, was denied his personal request that his case be continued for one day for the purpose of obtaining witnesses. Defendant represented to the court that if the continuance were granted he would be able to produce witnesses who were important to his defense. As a result of the court's denial of his request defendant was left without any evidence to corroborate his alibi. (Just as defendant here was left without any expert testimony on his defense of insanity.) The court stated (280 F.2d 603, 604):

"...[T]he opportunity of an accused to meet the prosecution's case with the aid of witnesses is historically and in practice fundamental to a fair trial. *Powell v. Alabama*, 287 U.S. 45 (1932).

"And the denial of the continuance has bearing here only in a 'but for' sense: but for the refusal of the continuance, MacKenna might have had a fair trial. The question is whether MacKenna had any trial. There is no trial without due process.

"The Court has an 'alert deference' to the judgments of state courts and scrupulously avoids unwarranted

federal intrusions into state procedures. . . . But MacKenna's request for habeas corpus is properly before us. On the record as we read it, MacKenna did not have his day in court to meet the prosecution's case. A fair chance for an accused person to say his say is so rooted in the traditions and conscience of our people as to be 'of the very essence of a scheme of ordered liberty.' "

See also *Brady v. Maryland*, 373 U.S. 83 (1963).

The record of Robinson's trial in the state court conclusively shows that he was denied his fundamental constitutional right to a fair trial by the atmosphere of haste in which his trial was conducted, and especially by the denial of a reasonable opportunity to obtain crucial witnesses. We submit that the findings of the Court below on this issue, as set forth above, in effect constitute a finding that due process was denied, and that these findings are amply justified by the record. Thus, the judgment of the Court below reversing the denial of Robinson's petition for habeas corpus should be affirmed, but should be modified to provide that the writ of habeas corpus issue and that Robinson be released unless, within a reasonable time, the state grants him a new trial.

#### IV.

#### **THE DECISION OF THE COURT BELOW IS SUPPORTABLE ON SEVERAL INDEPENDENT GROUNDS.**

- A. The Undisputed Facts Show That Robinson Was Insane At The Time Of Crime, Or At Least That The State Failed To Introduce Any Evidence On This Issue And Thus Failed To Prove An Essential Element Of The Crime.**

The evidence presented to the trial court conclusively demonstrated that Robinson was insane at the time he com-

mitted the alleged crime. Since the Constitution forbids the conviction of a man for acts committed while insane, it follows that Robinson must be released upon an unconditional grant of the writ of habeas corpus. No purpose would be served by remanding this case to the District Court to make further findings on the question of insanity since the record conclusively establishes this fact.

Moreover, even if the defense of insanity at the time of the crime were not "constitutionally protected," the record here demonstrates that Robinson must be released because of the state's failure to prove an element of the offense charged. Robinson's conviction under such circumstances violates due process.

Illinois law is clear that once any evidence of insanity is introduced at a trial, the so-called "presumption" of sanity vanishes, and the state must then prove beyond a reasonable doubt that the defendant was sane at the time of the alleged crime. *People v. Munroe*, 15 Ill. 2d 91, 98 (1958); *People v. Cochran*, 313 Ill. 508, 523-24 (1924); *People v. Witte*, 350 Ill. 558, 569 (1932). This "presumption" is not evidence of sanity, but only serves as a procedure for requiring the defendant to proceed first in raising the question, so that the State does not have to prove sanity if it is not an issue. *E.g.*, *People v. Munroe*, *supra*, at 98.

As has been indicated, the record here shows clear evidence of Robinson's insanity at the time of the allegedly criminal acts. Yet the State failed to offer a single word of evidence on that issue. Where the state fails to produce any evidence to prove a fact which state law requires it

to prove as a necessary element of the crime charged, the constitutional right to due process of law as guaranteed by the fourteenth amendment is denied. *Garner v. Louisiana*, 368 U.S. 157 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Robinson was thus denied due process, and is entitled to an unconditional writ of habeas corpus. While the Court below apparently rejected this contention, it is amply supported in law and fact, and provides an independent reason, not only for affirming the reversal of the District Court's denial of the writ, but for modifying the judgment below so that the writ issues.

**B. The Trial Court's Refusal To Permit Robinson To Summon Material Witnesses Violated His Sixth Amendment Right To Compulsory Process.**

During the second day of his trial Robinson requested that the trial be continued until the following morning so that he could confer with his attorneys about the calling of witnesses. After this request was denied, a colloquy ensued with the Court, in which Robinson specifically requested that a subpoena be issued for the Moores. Robinson had been present in the Moores' apartment the morning after the shooting, and they had caused and witnessed his arrest. The gun used in the shooting was found in their apartment in clothing allegedly belonging to Robinson. Officer Starr had even testified to conversations with the Moores during the state's case. Most important, the Moores obviously could have given important testimony of their observations of Robinson which would have presented a clearer picture of his mental condition at the time of the alleged crime. Nevertheless, Robinson's request that the Moores be subpoenaed was abruptly denied, the trial court saying, "We cannot subpoena people unless you tell us what they are going to testify to."

On the basis of this evidence, Judge Kiley<sup>1</sup> reasoned that Robinson's right to compulsory process had been denied him. (395 F.2d at 696-97; R. 178-179):

"In the wake of *Gideon v. Wainright*, 372 U.S. 335 (1963), holding that the Sixth Amendment right to counsel is embraced in the Fourteenth Amendment to protect that right against state action, it follows that the right of compulsory process must similarly be included in the Fourteenth Amendment protection. This right is as 'implicit in the concept of ordered liberty' as the right to counsel. In many cases unless a defendant had the opportunity to compel witnesses to appear in his behalf, the right to counsel would be meaningless. Unreasonable denial of a continuance to afford the defendant a timely opportunity to obtain witnesses by compulsory process was held to be a violation of this constitutional right in *Paoni v. United States*, 281 Fed. 801 (3rd Cir. 1922). And this basic right to process can be understandingly waived only by a defendant, not by his attorney. *Cf. Fay v. Noia*, 372 U.S. 391, 439 (1963)."

In a footnote Judge Kiley also cited *Pointer v. Texas*, 380 U.S. 400 (1965), decided after the opinion was first written, as further evidence that sixth amendment guarantees are to be made applicable to the states. In that case this Court held that the sixth amendment right to confront witnesses is applicable to the states.

Judge Kiley then emphasized that Robinson was not required to inform the trial court what the Moores' testimony would be. Its relevancy should have been apparent from the testimony concerning the arrest. Robinson had protested that his attorneys had been requested to subpoena the Moores. His attorneys said that they did not remember such a request. At the conclusion of the trial, Robinson

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<sup>1</sup> Judge Schnackenburg dissented from this portion of Judge Kiley's opinion; thus, the Court of Appeals rejected this contention as a separate ground for issuance of the writ by a 2-1 vote.

again protested the failure of the court to issue a subpoena for the Moores. After Robinson had been ordered taken from the courtroom, one of his attorneys, in defending against Robinson's assertion that his counsel were incompetent for not seeking to subpoena the Moores sooner, indicated that Robinson had agreed that the Moores should not be called. But, as Judge Kiley reasoned, "If, as alleged by Robinson, he immediately upon learning that his attorneys had failed to subpoena Mr. and Mrs. Moore as he had instructed them, requested that they be subpoenaed, and if he did not later understandingly abandon his desire to have them called, then his constitutional right was violated."

Judge Kiley's reasoning on this issue is clearly correct. The right to compulsory process is so fundamental that it must be applied to the states. A trial court has no right to require the defendant to explain the relevancy of the testimony of his witnesses before affording him that plain and unqualified protection. The record shows that Robinson was denied that protection. On this ground alone, the writ should issue.

Robinson did not waive this right. The record shows that he steadfastly asserted it up to the moment he was led from the courtroom. If the court has any doubt on this score, however, at the very least the case should be remanded to the District Court to determine on plenary hearing whether Robinson knowingly abandoned this basic constitutional right.

**C. The District Court's Failure To Appoint Counsel To Represent Robinson At The District Court Level Violated His Sixth Amendment Right To Court-Appointed Counsel.**

When Robinson petitioned for habeas corpus *in forma pauperis* he requested that counsel be appointed to assist

him. (R. 2.) The District Court granted Robinson leave to proceed *in forma pauperis*, but failed to appoint counsel to represent him. (R. 15-16.) This error in itself requires that the case be remanded to the District Court, with instructions that the Court appoint counsel to represent Robinson in the presentation of his claims.<sup>1</sup>

As early as 1937 this Court announced the principle that an accused "requires the guiding hand of counsel at every step in the proceedings against him." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1937). In *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court recognized that the right to court-appointed counsel is of such a "fundamental nature" as to be made obligatory on the states by the fourteenth amendment.

This Court has also made it clear that the right to counsel, being essential to the protection of the rights of criminal defendants, is not confined to the actual trial of an accused, but begins with the commencement of the accusatory process. *Escobedo v. Illinois*, 378 U.S. 478 (1964). It is not surprising in light of the constant broadening of the right to counsel to meet the recognized needs of criminal defendants that this right has been extended to habeas corpus applicants. See *Campbell v. United States*, 318 F. 2d 874 (7th Cir. 1963); *Milani v. United States*, 319 F. 2d 441 (7th Cir. 1963).

In *Fay v. Noia*, 372 U.S. 391 (1963), this Court emphasized the historical importance of the writ of habeas corpus, pointing out that "there is no higher duty than to main-

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<sup>1</sup>The Court of Appeals did not reach this issue, since it found that a plenary hearing was mandatory. The Court did, however, require the District Court to appoint counsel to act for Robinson at the plenary hearing, thus indicating the belief that it was error not to do so in the first instance.

tain it unimpaired." 372 U.S. at 400. Clearly this duty cannot be met if indigent habeas petitioners are to be denied the assistance of counsel in presenting the often complex constitutional issues which arise on habeas. Moreover, the appointment of counsel would materially aid the District Courts themselves in determining which cases require a plenary hearing, which may be denied without hearing and which require that the writ issue without further hearing.

It is no answer to say that habeas corpus is a "civil" action. In *Smith v. Bennett*, 365 U.S. 708, 712 (1961), this Court observed that "The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." Since a habeas corpus petitioner may regain liberty once lost through the criminal process, only a tyranny of labels could classify such a proceeding as "civil" solely to deny to the applicant the assistance of counsel and thus frustrate the high duty of the federal courts to maintain the writ of habeas corpus unimpaired.

## V.

**THE FURTHER PROCEEDINGS ORDERED BY THE COURT OF APPEALS CAN ONLY BE HELD IN THE DISTRICT COURT. HOWEVER, A PLENARY HEARING IN THE DISTRICT COURT COULD PROPERLY BE AVOIDED BY ISSUANCE OF THE WRIT SUBJECT TO AFFORDING THE STATE A REASONABLE OPPORTUNITY TO GRANT ROBINSON A NEW TRIAL.**

In its grant of certiorari this Court specifically requested that the parties brief and argue "the question whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the ap-

propriate Illinois courts rather than in the District Court." Clearly the evidentiary hearing ordered by the Court below to determine whether Robinson was insane at the time of the crime, and whether he was denied due process by failure to hold a hearing on his competency to stand trial, can properly be held only in the Federal District Court. The federal courts on habeas corpus have no power to "remand" a case to the state court. They must issue the writ, or deny it.

Certification of this issue, however, raises the question of whether the judgment of the Court below should be modified to provide that the writ should issue conditioned upon the failure of the state to retry Robinson or grant him a hearing within a reasonable time. If such a conditional release is ordered, we submit that the only appropriate procedure in the state court under the circumstances would be a complete new trial. Robinson's rights would not be protected by a limited hearing in the state court.

**A. The Federal Courts On Habeas Corpus Have No Power To "Remand" This Case To The State Court For Further Proceedings.**

Petitioner suggests that this Court should "remand" Robinson to an Illinois court for the evidentiary hearings which the Court of Appeals held should take place in the Federal District Court (Pet. Br. p. 30). The federal courts, however, have no power, in a habeas corpus proceeding, to "remand" a case to the state court to decide federal constitutional issues. They must themselves determine whether the imprisonment violates a prisoner's constitutional rights. Petitioner misapprehends the function of the writ of habeas corpus and the power of the federal courts in regard to the writ. He misinterprets *Jackson v. Denno*, 378 U.S. 368 (1964).

1. THE FEDERAL COURTS MUST RETAIN JURISDICTION UNTIL THEY DETERMINE WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED.

As its name implies, the writ of habeas corpus is directed to the detention of the physical person of the petitioner. When a state prisoner seeks a writ of habeas corpus in a federal court, the function of the federal court is to determine whether the prisoner's incarceration by the state authorities violates his federal constitutional rights. See 28 USC § 2241(c)(3) (1964). The court's only power is to order the prisoner's release if it finds that he is detained in violation of his constitutional rights. The federal district court must retain the case until it makes that determination—it cannot remand the case to allow the state court to make it, nor can it order the state to revise its judgment, change its procedures, or grant the petitioner a new trial or hearing. See Bailey, *Federal Habeas Corpus—Old Writ, New Role: An Overhaul for State Criminal Justice*, 45 Boston U.L. Rev. 161, 190 (1965). These principles, clear throughout the history of the writ, were recently restated by this Court in *Fay v. Noia*, 372 U.S. 391 (1963), as follows (372 U.S. at 430-431):

“Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power, it cannot revise the state court judgment; it can act only on the body of the petitioner. *Medley, Petitioner*, 134 U.S. 160, 173.”

2. ONCE A CONSTITUTIONAL VIOLATION IS FOUND, HOWEVER, THE STATE MAY BE PERMITTED TO DELAY PETITIONER'S RELEASE BY GRANTING HIM A NEW TRIAL.

A federal court may find a violation of a prisoner's constitutional rights in the denial of due process during his state trial based on one or both of the following:

(1) The court may find that the prisoner has been afforded a constitutionally inadequate procedure for determining an issue, such as the voluntariness of a confession. Such a finding was made in *Jackson v. Denno, supra*. The fault may be in the failure of state law to provide a proper procedure, or in the failure of the trial court to afford the defendant a fair hearing though a proper procedure was available. For shorthand purposes, we refer to this as a finding of a violation of "procedural" due process.

(2) The court may find that the state court determination of a constitutional issue, such as voluntariness of a confession, was erroneous. This may be found on the face of the record, or, more commonly, after a plenary hearing. For shorthand purposes, we refer to this as a violation of "substantive" due process, since it involves the actual decision of a substantive question of historical fact.<sup>1</sup> Was the confession voluntary? Was Robinson insane?

The federal court, after finding that a prisoner is detained in violation of his constitutional rights, may permit the state to retain custody of the prisoner for a reasonable time to hold a new trial or hearing, provided that the constitutional violations which gave rise to the issuance of the writ can be remedied and a sound conviction and incarceration obtained.

Generally speaking, a writ of habeas corpus will be issued conditionally when the federal court has found a violation of "procedural" due process in the conduct of the petitioner's trial or a violation of "substantive" due process on an issue which is of constitutional stature but is less than determinative of the case on its merits, such as where an involuntary confession has been used in obtaining a conviction.

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<sup>1</sup> In classical terminology, of course, both these questions would be characterized as involving procedural due process.

3. A PLENARY HEARING IN THE DISTRICT COURT IS REQUIRED WHERE IT CANNOT OTHERWISE BE DETERMINED WHETHER THERE WAS A CONSTITUTIONAL VIOLATION.

Where the federal court on the face of the pleadings or upon examination of the report of proceedings in the state court finds that a violation of the petitioner's rights has infected the state court proceeding, it must issue the writ and order petitioner's release—conditionally or unconditionally as the facts may dictate. On the other hand, the federal court may dismiss or deny the petition without hearing if the prisoner fails to allege a constitutional violation; fails to exhaust state remedies;<sup>2</sup> or if the record of

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<sup>2</sup> One method in which the federal courts afford the states an opportunity to make their own determination of federal constitutional issues raised by a habeas applicant is to hold that he has failed to exhaust his state court remedies. As this Court held in *Fay v. Noia*, however, this doctrine applies only to remedies which are actually available to the petitioner. In *Brown v. Allen*, 344 U.S. 443 (1953), this Court specifically held that the failure of a state prisoner to exhaust state collateral remedies on an issue he raised at trial and appealed through the highest Court of the state would not constitute a failure to exhaust state court remedies so as to bar federal habeas corpus relief. This decision apparently was based on recognition of the futility of requiring a state prisoner to ask a state trial judge, on collateral attack, to "reverse" his own supreme court on an issue which was raised and rejected at trial and on direct appeal. In Illinois, it is more than just a question of practical futility. Under Illinois law, a defendant is specifically barred from raising any issue in a petition under the Post Conviction Hearing Act, Ill. Rev. Stats. Ch. 38, §§ 122-1 through 122-7 (1965), which was raised and determined at trial or on direct appeal. *People v. Dolgin*, 6 Ill. 2d 109, 111 (1955); *Ciucci v. People*, 21 Ill. 2d 81, 85 (1960). Thus, in the case at bar, there has never been any question but that Robinson has exhausted his state court remedies with respect to the issues here raised. The District Court and the Court of Appeals have so held, and the petitioner has never contended otherwise. Robinson's sole remaining remedy is in federal habeas corpus.

the state court proceedings shows that the prisoner received a full and fair hearing on the constitutional issue in the state court, that the state court applied proper constitutional standards and that its findings are reasonably supported by the record.

But if the petition states facts which, if true, would entitle the prisoner to relief, and if the record does not preclude the possibility of a constitutional violation, then the Federal courts have the *power* to hold an evidentiary hearing on the facts relating to alleged constitutional violations, and if one of the conditions enumerated in *Townsend* exists, the exercise of the hearing power is *mandatory*. The purpose of such a hearing is to determine whether a constitutional violation in fact exists where the record is not determinative of that question. Until that question is answered, for or against a prisoner, a federal court has no power to enter any orders in the proceeding except those necessary in aid of its jurisdiction. It may not issue the writ until it has found a constitutional violation, nor may it require the state court to conduct any further proceedings, including any proceedings aimed at determining the constitutional issue.

Where the petition for writ of habeas corpus raises issues of both "substantive" and "procedural" due process, however, and where the federal court finds, on the face of the record, that procedural errors were committed in the state court which were so grave as to themselves constitute a violation of "procedural" due process, then the court may issue the writ without itself determining the "substantive" issue, on the theory that if the state elects to exercise its opportunity to retry the petitioner under full procedural protections, the need for the federal court to determine the substantive issue may not re-occur.

This is precisely what happened in *Rogers v. Richmond*, 365 U.S. 534 (1961) and *Jackson v. Denno*, 378 U.S. 368 (1964), cited by petitioner (Pet. Br. pp. 28-30). The significant differences in the relief afforded the petitioners in those two cases will be discussed below. Suffice it to say, at this point, that in both cases this Court *found* a violation of "procedural" due process and *issued* the writ of habeas corpus. It did not, as petitioner would suggest, "remand" the case to the state court so that the state court could determine whether a violation of due process had occurred. Such a holding would be impermissible.

**B. The Judgment Of The Court Below Should Be Modified To Provide For Issuance Of The Writ of Habeas Corpus.**

With respect to each of the constitutional issues discussed in the earlier sections of this brief, we believe that the record on its face shows violations of Robinson's federal constitutional rights. These arguments have been presented and will not be repeated here. To summarize, the record shows that:

- 1) Robinson was denied due process by the failure of the trial court to convene a jury and conduct a hearing to determine his sanity at the time of trial. Because of the substantial evidence that Robinson was insane at the time of trial, due process required that the court invoke the established Illinois procedure for canvassing this issue.
- 2) Robinson was denied due process of law because the trial court failed to afford him a full and fair hearing on the issue of his competence to stand trial, without regard to the procedures required by state law. The conduct of his trial as a race against time deprived him of important witnesses on the issue of competency.

3) Robinson was denied due process of law by the failure of the trial court to afford him a full and fair hearing on the issue of his sanity at the time of the crime. Conducting his trial in an atmosphere of haste deprived him of essential witnesses on this issue.

4) Robinson was in fact insane at the time of the crime, or in any event the state failed to adduce any evidence to prove an essential element of its case; that Robinson was sane at the time of the crime. Thus his detention is unconstitutional.

5) Robinson was deprived of his sixth amendment right to compulsory process by the trial court's refusal to issue a subpoena for the Moores after Robinson's request that they be subpoenaed.

For each of the reasons set forth above, the writ of habeas corpus should issue.

With respect to each of these issues except those mentioned in subparagraph 4, however, this Court could condition the granting of the writ on the failure of the state to retry Robinson within a reasonable time.

If the writ issues, the only remaining question is whether Illinois should be permitted to afford Robinson anything less than a full new trial if it wishes to delay his release.

**C. If A Conditional Writ Is Granted, The State Cannot Grant Robinson Anything Less Than A New Trial.**

The State argues, on the basis of the decision of this Court in *Jackson v. Denno*, 378 U.S. 368 (1964), that this cause should be "remanded" to the state court for evidentiary hearings on the limited issues of whether Robin-

son was in fact competent to stand trial when he was tried in 1959, and whether he was insane at the time of the alleged crime. We have discussed the erroneous assumption that a federal court in habeas corpus has jurisdiction to "remand" a case to the state court. Nevertheless, if this Court decides that a conditional writ of habeas corpus should issue, it must also determine whether the state may grant Robinson anything less than a new trial on all of the issues. The procedural issues raised by *Jackson v. Denno* would thus be squarely presented.

1. THIS COURT HAS ALWAYS SOUGHT TO RECOGNIZE THE "EXIGENCIES OF FEDERALISM" SO LONG AS ITS HIGHER DUTY TO ENFORCE THE FEDERAL CONSTITUTION IS NOT IMPAIRED.

The federal courts have always been sensitive to the delicate relationship between state and federal courts and the "exigencies of federalism" as affected by habeas corpus proceedings involving state prisoners. At the same time these considerations have not deterred the federal courts from affording the writ its full use in guaranteeing all citizens the protection of the federal constitution. As this Court stated in *Fay v. Noia*:

"There is no higher duty than to maintain it [the writ of habeas corpus] unimpaired . . ." (372 U.S. at 400.)

These dual considerations were of utmost importance to the result reached by this Court in *Rogers v. Richmond*, 365 U.S. 534 (1961), which involved a claim that a coerced confession had been used in obtaining the petitioner's state conviction. This Court granted certiorari to determine whether a plenary hearing in the District Court was necessary on the "substantive" issue of whether the confession was in fact coerced. (365 U.S. at 540.) Upon examination of the record, however, this Court found that the state

court had used an improper standard for determining whether the confession was voluntary and admissible. The use of the improper standard itself deprived the prisoner of "procedural" due process of law. Thus, without determining whether the confession was in fact involuntary and whether its admission into evidence violated petitioner's "substantive" constitutional rights, this Court ordered the writ issued, subject to the right of the state to retry petitioner. This Court felt that the federal courts should not withhold the writ and retain jurisdiction to determine the "substantive" issue of whether the confession was, in fact, involuntary. And that holding was based as much upon considerations of federalism as upon concern for the rights of the petitioner. This Court reasoned that the state court, wherever possible, should have the *opportunity* to decide the "substantive" issue, applying proper standards and procedures, before the federal courts took jurisdiction. This opportunity was afforded the state by issuance of the conditional writ. Of course, this Court would have ordered the District Court to hold a plenary hearing and decide the "substantive" issue if the record had not, on its face, revealed the violation of "procedural" due process. This was subsequently made clear by this Court in *Townsend*.

The considerations of federalism expressed in *Rogers* were carried one step further in *Jackson v. Denno*, 378 U.S. 368 (1964). In that case, this Court invalidated the New York procedure which allowed the trial judge to submit the question of the voluntariness of a confession to the jury along with the question of guilt or innocence, rather than making a full, independent determination of voluntariness before trial. This Court found that this *procedure* itself failed to meet applicable standards of due process.

This Court therefore held that the writ should issue. Rather than condition the petitioner's release on the state's failure to afford him a new trial, however, this Court allowed the state to grant the petitioner a *limited, separate hearing on the voluntariness of his confession*. If the confession were found to be voluntary on that hearing, no new trial would be necessary. (Of course, petitioner would be free thereafter to seek a plenary hearing on the issue in the District Court in a new petition for writ of habeas corpus).

The question, then, is whether the *Jackson*<sup>3</sup> procedure is applicable to the case at bar, so that if the writ issues, the state could be permitted to grant Robinson a separate limited hearing either on the issue of his sanity at the time of the alleged crime, or his competency to stand trial in 1959, or both. The answer is clearly "No".

2. THE UNIQUE CONSIDERATIONS OF "FEDERALISM" WHICH INFLUENCED THIS COURT IN *JACKSON* v. DENNO ARE NOT PRESENT HERE.

The rationale of *Jackson* is inapplicable to the case at bar for two reasons.

First, in *Jackson* the petitioner had apparently received a full and fair hearing with respect to his confession in accordance with long standing state procedures. Indeed, as this Court emphasized, New York could not have anticipated that its long accepted procedure would be found inadequate. Under these circumstances, in what might be termed a "twinge of conscience", this Court found it appropriate to take special pains to avoid imposing on

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<sup>3</sup> Although the state has only cited *Jackson*, we point out that this Court has, since *Jackson*, entered a similar order under similar factual conditions in *Boles v. Stevenson*, 379 U.S. 43 (1964). In *Henry v. Mississippi*, 379 U.S. 443 (1965) this Court remanded a case to the state court for a limited hearing. However, that case was on direct review, so that a remand order was possible.

the "delicate relationship between state and federal courts." Because New York never had an opportunity to apply proper procedures to Jackson's case, this court devised the technique of permitting the state to hold a limited hearing as a means of avoiding execution on the writ. That this was the motivating factor in the Court's holding is apparent from its opinion (378 U.S. at 395):

"Obviously, the State is free to give Jackson a new trial if it so chooses, but for us to impose this requirement before the outcome of the new hearing on voluntariness is known would not comport with the interests of sound judicial administration and the proper relationship between federal and state courts. We cannot assume that New York will not now afford Jackson a hearing that is consistent with the requirements of due process. *Indeed, New York thought it was affording Jackson such a hearing, and not without support in the decisions of this Court*, when it submitted the issue of voluntariness to the same jury that adjudicated guilt." (Emphasis added.)

The considerations which led this Court to devise the unique form of writ in *Jackson* are not present in the case at bar. Robinson is not suggesting that the established Illinois procedure for determining sanity at the time of the crime or at the time of trial must be changed. This is a case where the record shows that the state failed to afford Robinson the protection of its own standards for considering basic constitutional issues and failed to afford Robinson fundamental due process with respect to issues which it recognized were of constitutional significance. The state had an adequate opportunity to give Robinson a full and fair trial in accordance with proper standards and procedures, but failed to do so.

To extend the *Jackson* procedure to cases of this nature would allow a state to continually deny a prisoner its recognized procedures. If every time a state refused to afford a prisoner a fair hearing on constitutional issues the district court on habeas corpus would simply return the case to the state courts for limited hearing, the prisoner might indefinitely be denied his substantial procedural rights. See *Robbins v. Green*, 218 F.2d 192, 195 (1st Cir. 1954). Furthermore, as a practical matter, the state trial judge, conducting a limited hearing, cannot help but be influenced by the earlier finding against the defendant, both on the limited issue and generally. This is especially true when the conviction was reviewed and affirmed by his state supreme Court. We do not necessarily suggest that the Illinois courts would again deny Robinson a fair hearing if a limited hearing were allowed, or even that the state court judge, on limited hearing, would be influenced in his findings by what occurred before. But these are possibilities, however remote, which this Court need not suffer where, as here, Illinois had an opportunity to apply adequate procedures, but failed to do so. The peculiar circumstances which motivated this Court in *Jackson*, in accordance with the exigencies of federalism, are absent here.

3. ROBINSON'S RIGHTS WOULD NOT BE FULLY PROTECTED IF THE "JACKSON" PROCEDURE WERE APPLIED HERE.

A second factor which permitted this Court to order a limited hearing in *Jackson* clearly precludes such a hearing here.

The denial of "procedural" due process which this Court found in *Jackson* was the failure of the *trial judge* to hold a *separate hearing* and make definitive findings on a matter of *historical fact*. The exact procedure which was originally denied to Jackson could now be afforded him

in a limited hearing, under the same conditions as would have applied at Jackson's trial. If the trial judge, after conducting such a hearing in the first instance, had found that the confession was voluntary, Jackson's jury trial on the merits would have been conducted exactly as it was, with the same result. This Court in the *Jackson* opinion clearly emphasized that the limited hearing technique on the peculiar facts of that case would give Jackson every right and advantage that he would have had if his original trial had been conducted in accordance with procedural due process. Such a finding is the *sine qua non* for approval of the "limited hearing" technique adopted by the majority in *Jackson*.

In this case, however, it is clear that Robinson could *not* be afforded his full rights by a limited hearing in the state court, either on the issue of sanity at the time of the crime or sanity at the time of trial. A separate judicially conducted hearing limited to the issue of Robinson's sanity at the time of the crime would be an entirely unique proceeding, much different from that to which Robinson was originally entitled. The issue of sanity at the time of the crime is not a collateral issue like the voluntariness of a confession. It is an issue to be tried together with, and as a part of, the defendant's trial on the merits. It is an issue on which the right to cross examine the state's occurrence witnesses is often important, as demonstrated by this case. In a limited hearing, the state would not be required to produce these witnesses and the defendant might be unable to do so. It is an issue on which the defendant has a right to a jury trial under both the state and federal constitutions. Robinson waived that right when the issue was first heard, but if he was denied a fair trial by the court in the first instance, he should and would have an opportunity to assert that right upon a new

trial. A limited hearing would deprive him of his right to a jury trial. Finally, it is an issue which, when tried with the case on the merits, may affect the verdict even in the absence of a finding of insanity, as by leading the judge or jury to a finding of guilty of a lesser included offense, such as voluntary manslaughter. This result would not be possible with a limited hearing in the state court on the issue of sanity at the time of the crime, whereby the murder verdict would be permitted to stand if Robinson is found to have been sane.

Clearly, if due process was denied Robinson by the state court's handling of the issue of his sanity at the time of the crime, it cannot be satisfied by now permitting the state to keep him in custody upon granting him a separate judicial hearing in which the issues are limited to sanity at the time of the crime. He must have a new trial.

The same is true, although for somewhat different reasons, with respect to the issue of sanity at the time of trial. On its face, this issue is more nearly analogous to the confession situation in *Jackson*, since the issue of competency to stand trial is a "collateral" issue which, under proper Illinois procedure, is determined by a jury in a proceeding separate from the trial on the merits. Nevertheless, a crucial distinction makes it impossible to afford Robinson the right he was denied in 1959 by now holding a hearing limited to the issue of his competency to stand trial in 1959.

The determination of competency to stand trial is a unique proceeding in criminal jurisprudence. While the pretrial hearing on the voluntariness of a confession or the admissibility of evidence is intended to determine his-

torical facts, the jury hearing on competency to stand trial is very different. That procedure is intended to determine a presently existing state of being of the defendant. The question to be decided is whether at the moment of decision, the defendant is competent. The jury has an opportunity to observe the defendant during the proceeding. Expert psychiatric witnesses who have observed him immediately prior to the hearing will testify. It is, in short, a proceeding designed to determine as accurately as possible, a present, existing fact of critical importance.

*Such a determination simply cannot be made six years after the fact.* To have a jury determine now whether Robinson was competent to stand trial in 1959 is to change the very nature of the right which was denied him in 1959. The jury would be unable to observe the subject of their inquiry. Expert witnesses would have to testify solely on the basis of their reading of the cold record of the prior trial. The unique value of a concurrent rather than historical determination is wholly lost. Robinson had a right to a full and adequate determination of his competency to stand trial at the time he was tried. Having been denied that right, it is obvious that his constitutional rights cannot be protected by attempting to make that determination six years after the fact. He is entitled to a new trial, prior to which the question of his *present* competency may be canvassed. The *Jackson* "limited hearing" technique simply cannot be applied.

#### 4. THE "JACKSON" PROCEDURE SHOULD BE RE-EXAMINED, OR STRICTLY LIMITED.

The *Jackson* approach is inapplicable to the case at bar, both because the uniquely strong considerations of "federalism" which existed in *Jackson* are absent here, and because the rights of Robinson cannot be adequately protected by limited hearings on the issues of sanity at the

time of the crime or at the time of trial. Moreover, we share the concern expressed in the dissenting opinions of Justices Black and Clark in *Jackson*, and Justice Black in *Henry v. Mississippi*, 379 U.S. 443, 453 (1965) and *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 246 (1957) over such a "piecemeal procedure". Even in a case such as *Jackson* it is difficult to say that the defendant is being afforded his full rights by a limited hearing. The basic concept of habeas corpus requires that a prisoner detained in violation of his constitutional rights be afforded a full retrial. The right of the citizen to due process is too basic to our civilization to be diluted by attempts at piecemeal corrections. To permit such a procedure is to encourage less than devoted attention to fundamental rights by the state courts. And however difficult it may be to see how the defendant's rights can be prejudiced by the procedure in a case like *Jackson*, the risk should not be taken.

Moreover, the court cannot ignore the subtle influences which are brought to bear on a state trial judge, however conscientious and devoted, when faced with the task of retrying a limited issue which has already been decided against the defendant both by a fellow trial judge and the supreme court of his state, particularly where a decision on the defendant's behalf will cause the state to release him or grant him a full new trial. That Illinois, under its Post Conviction Hearing Act, refuses to permit its trial court even to consider issues previously raised at trial or rejected on appeal provides a further indication of the reception Robinson would receive if a limited hearing were ordered. As indicated above (footnote 2, p. 66), the futility of requesting a state trial court to re-examine a contention previously re-

jected by the state supreme court led this Court to hold, in *Brown v. Allen*, 344 U.S. 443 (1953), that state remedies were adequately exhausted for habeas corpus purposes without resort to collateral attacks on previously determined issues.

The recent decision of the Supreme Court of Washington in *White v. Rhay*, 399 P. 2d 522 (1965), is also instructive, both in revealing the attitude of some state courts toward habeas corpus applicants, and in its rejection of federal court efforts to afford the state an opportunity to re-examine federal constitutional issues. (399 P. 2d at 528-30)

The case at bar is clearly distinguishable from *Jackson*. Nevertheless, we respectfully suggest that this court re-examine the procedure adopted in that case.

5. THE NUMBER OF FEDERAL HABEAS CORPUS PETITIONS CAN BE REDUCED ONLY BY PERSUADING THE STATES TO GIVE SCRUPULOUS ATTENTION TO CONSTITUTIONAL CLAIMS IN THE FIRST INSTANCE.

We are aware of this Court's concern over the increasing number of habeas corpus petitions filed in the district courts, coupled with the dissatisfaction voiced in some quarters over the federal courts' "pre-emption" of the states' administration of their criminal laws. Nevertheless, this Court's first concern must be to afford the full protections of the Constitution to all citizens, and to "maintain [the writ of habeas corpus] unimpaired." The increase in the number of habeas corpus *petitions* is caused, not so much by procedural decisions such as *Townsend* and *Fay* as by those decisions recognizing the expanding concept of due process in our society, such as *Mapp v. Ohio*, 376 U.S. 693 (1961), *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Griffin v. Illinois*, 351 U.S. 12 (1956), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Jackson* itself. Much of the present habeas corpus litigation originates with prisoners

who have been in state custody for many years, but whose claims have only recently been held to raise legitimate questions of due process. The number of petitions will inevitably diminish as the backlog is eliminated. It is true that the *Toussend* decision caused an increase in the number of plenary hearings in the district courts, but even so, in the year ended June 30, 1965 only about eleven percent of the habeas petitions disposed of by the district courts reached the hearing stage. [1965 Annual Report of the Administrative Director of U. S. Courts, Table C4 (tentative draft).]—With 468 such hearings split among 289 District Court judgeships over a period of a year, it can hardly be said the burden is so intolerable as to justify any drastic narrowing of the protections now afforded.

Moreover, the *Jackson* procedure will not lessen the work load presently placed on the federal courts—they must still determine whether a constitutional violation has occurred. Having accomplished that task, it will not affect the federal judges' workload whether the state is required to hold a full trial or a limited hearing. On the other hand, permitting the states to attempt to correct due process violations on a piecemeal basis may lessen the motivation of the states to be diligent in protecting the defendant's rights in the first instance—and experience shows that it is stimulation of this motivation, rather than an undue, and often unappreciated concern for "federalism" and "comity", which in the long run will reduce the number of habeas corpus hearings in the federal courts.

Until the state courts themselves can be persuaded to exercise scrupulous care in considering the federal constitutional claims of their criminal defendants, it will continue to be necessary to hold plenary hearings in the district courts in a certain number of cases. We do not

suggest that this Court should ignore the "delicate balance between the state and federal courts." In the unusual situation where a previously unquestioned state procedure of long usage is struck down, as in *Jackson*, there may be just cause for exercising particular discretion. But in any other situation, both the full protection of the constitutional rights of the defendant and the desire to reduce the number of plenary hearings in the district courts will best be served by compelling the states to afford a full and fair trial to defendants who were denied a fair trial in the first instance. As this goal is achieved, and the occasions for federal court examinations of state fact findings diminish, so, necessarily, will the concern over "pre-emption" diminish.

### CONCLUSION.

The opinion of the Court of Appeals for the Seventh Circuit should be affirmed, but modified to provide that the writ of habeas corpus issue unconditionally. Alternatively, a conditional writ should issue, affording the state courts a reasonable time to grant Robinson a new trial. At the very least, the opinion of the Court below, ordering plenary hearings in the District Court, should be affirmed.

Respectfully submitted,

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